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THE SCOPE OF INTERNATIONAL LAW

By C. WILFRED JENKS, LL.D.

THE present article is an attempt to reassess the scope and province of contemporary international law. It elaborates the thesis that the developments in the substance of the law of nations which have occurred in the first half of the twentieth century have so transformed the character and content of the international legal system that it can no longer be satisfactorily presented within the framework of the classical exposition of international law. It is not a plea for change or development in the substance of the law. The substance of the law has kept pace with the changing needs of the times to a remarkable extent. This is perhaps not a matter for surprise for, as has been well said, 'legal problems after all are solved not so much by the preoccupations of scientific jurists, or even of any one generation of practitioners, but by the steady pressure of human developments'.[1] It is a plea for re-examination of existing concepts of the structure and arrangement of international law with a view to ascertaining how far the substance of the contemporary law can be satisfactorily presented on the basis of these concepts. International lawyers have been widely and proudly conscious of the progress made in developing the substance of the law since the First World War: in the leading periodicals, and especially in the *British Year Book of International Law* and the *American Journal of International Law*, and in such publications as the *Annuaire de l'Institut de Droit International* and the *Recueil des Cours* of the Hague Academy of International Law, the newer developments in the law have claimed a preponderant share of professional attention; and in the successive editions of *Oppenheim* a consistent attempt has been made to do justice to these developments.[2] It is believed, however, that the problem is more fundamental in character; that it does not suffice to attempt to relate these developments to a pre-existing structure and arrangement of the law originally evolved on the assumption that international law is a law between 'States solely and exclusively' and to give an account of them within, or by somewhat haphazard and illogical modifications of or accretions to, a pre-established framework; but that it is necessary to reconsider thoroughly in the light of these developments the adequacy of the existing structure and arrangement of the law and so to present the contemporary law as a whole that the newer developments fall into an appropriate perspective. While we continue to start from the proposition that international law consists of 'the principles and rules of conduct declaratory thereof which States feel themselves bound to observe, and, therefore, do commonly observe in their relations with each other',[1] the new synthesis which is necessary to permit of an intelligent and intelligible presentation of the contemporary law will remain unattainable.

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[1] Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), p. 477.

[2] See, particularly, 8th ed. by Lauterpacht (1955), vol. i.

The present article is an attempt to explore, empirically and experimentally, an approach towards such a new synthesis based on the conception that contemporary international law has outgrown the limitations of a system consisting essentially, or perhaps even primarily, of rules governing the mutual relations of States and must now be regarded as the common law of mankind in an early phase of its development. By the common law of mankind is meant the law of an organized world community, constituted on the basis of States but discharging its community functions increasingly through a complex of international and regional institutions, guaranteeing rights to, and placing obligations upon, the individual citizen, and confronted with a wide range of economic, social, and technological problems calling for uniform regulation on an international basis which represents a growing proportion of the subject-matter of the law. The imperfect development and precarious nature of the organized world community is reflected in the early stage of development of the law but does not invalidate the basic conception. On such a conception, the law governing the relations between States is one, but only one, of the main divisions of the subject. The extent to which such a conception involves a new presentation of the law will be apparent from a brief retrospective survey.

A generation ago international law was widely and not unreasonably regarded as consisting of the rules governing the mutual relations of States in peace and in war. Oppenheim, for instance, opens his treatise with the proposition that 'Law of Nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other',[2] and subsequently elaborates this proposition into the well-known *dicta* that 'the Law of Nations is a law for the intercourse of States with one another, not a law for individuals'[3] and that 'States solely and exclusively are the subjects of International Law'.[4] Hall's opening sentence is very similar. 'International law', he writes, 'consists in certain rules of conduct which modern civilised States regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.'[1] In discussing persons in international law he proceeds: 'Primarily international law governs the relations of such of the communities called independent States as voluntarily subject themselves to it. To a limited extent, as will be seen presently, it may also govern the relations of certain communities of analogous character.'[2] Discussing when a community becomes a person in law, he adds that, subject to a limited exception in respect of belligerent communities, 'States being the persons governed by international law, communities are subject to law . . . from the moment, and from the moment only, at which they acquire the marks of a State.'[3] International law, so conceived, fell naturally into three main divisions, peace, war and neutrality. The law of war, while placing restraints upon arbitrary belligerent action the importance of which as a safeguard for the most elementary standards of humane conduct has been re-emphasized by subsequent experience, postulated the legality of war itself and gave identical rights to the aggressor and the victim of aggression. The law of neutrality, while constituting a valuable check upon the tendency of every major conflict to widen as it proceeds, was derived from the same postulate that recourse to war for the redress of grievances is not in itself illegal, the duty of the neutral being to act impartially towards all belligerents, irrespective of the substantive merits of the dispute or their degrees of responsibility for recourse to war. The law of peace was regarded as consisting primarily of rules governing the commencement, continuity, and termination of the existence of States; the dependence of certain States upon others; title to territory; the extent and limitations of the jurisdiction of States (*ratione situs*, *ratione materiae*, and *ratione personae*); the modalities of diplomatic intercourse; and agreements between States. As recently as 1944 Brierly stated the primary function of international law as being 'to define or delimit the respective spheres within which each of the sixty-odd States into which the world is divided for political purposes is entitled to exercise its authority'.[4] On this view, the function of international law is to delimit the competence of States rather than to govern the cross-frontier relationships of human beings. Brierly elaborates the point further: 'Each of these States is independent of the others, and each has its own governmental and legal system; if there is not to be a clash between their respective competences there must clearly be some principles to determine where the competence of one State ends and that of another begins. These principles are given by international law, and once that is understood most of these topics that wear an appearance of formalism and remoteness from the real life of the world in the text-books fall into their place.'

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[1] Hyde, *International Law Chiefly as Applied and Interpreted by the United States* (2nd revised ed., 1945), vol. i, p. 1.

[2] *International Law*, 1st ed. (1905), vol. i, p. 3.

[3] Ibid., p. 4.

[4] Ibid., p. 18.

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[1] *International Law*, 3rd ed. (1890), p. 1.

[2] Ibid., p. 18.

[3] Ibid., p. 21.

[4] *The Outlook for International Law* (1944), p. 9.

Widespread dissatisfaction with this conception of international law has developed during the last generation to the point at which there is now a general sense that the conception is an inadequate and an unhelpful one.

Among lay writers Sir Alfred Zimmern has put the matter with his customary vigour and pungency. 'Modern international law was developed as a means for regulating external contacts rather than as an expression of the life of a true society.'[1] This is the fundamental source of its weakness. 'Men obey the law because they respect it, and they respect it because they associate themselves with the object of the law-giver or the law-making authority, which is to promote the purpose of their community and, through it, of their own individual lives.'[2] Such was the basis of respect for law in ancient Greece; such is the basic strength of the common law tradition. International law as presented in the books is not 'a body of rules regulating the life of the international community',[3] but an amalgam of survivals from past conditions, rules of etiquette and anticipations of things to come. A legal system so conceived cannot play a significant, still less a decisive, role in the development of an international community. A substantial number of the leading and most influential writers on the problems of international politics and international organization, including Leonard Woolf,[4] Headlam-Morley,[5] Shotwell,[6] Madariaga,[7] Rappard,[8] E. H. Carr,[9] Hugh Gibson,[10] Walter Lippman,[11] and George Kennan,[12] have written in the same vein. International lawyers cannot reasonably neglect so varied and responsible a body of lay opinion.

Expressed in such unqualified terms as those used by Sir Alfred Zimmern, the criticism admittedly tends to overreach itself, and Brierly[13] and others have replied to it with considerable cogency. In so far, indeed, as some of these writers challenge the moral basis of international law and the applicability to the conduct of international relations of moral principles (as distinguished from the habit of moralizing) they challenge the foundations of all human society. The basic charge that international law as traditionally conceived is politically, morally, and socially inadequate calls, however, for a more detailed reply and after the lapse of twenty years Zimmern's analysis still presents a challenge which has not been fully met

[1] *The League of Nations and the Rule of Law, 1918–1935* (1st ed., 1936), pp. 98–99.

[2] 'International Law and Social Consciousness', in *Transactions of the Grotius Society*, 20 (1934), pp. 27–28.

[3] Ibid., p. 32.

[4] *International Government* (1916).

[5] *Studies in Diplomatic History* (1930), pp. 10–50.

[6] *The Great Decision* (1944), pp. 109–14.

[7] *The World's Design* (1938), pp. 99–135.

[8] *The Quest for Peace* (1940), pp. 134–207 and 482–5.

[9] *The Twenty Years' Crisis* (1939), pp. 219–63.

[10] *The Road to Foreign Policy* (1944), pp. 64–76.

[11] *United States War Aims* (1944), pp. 170–182.

[12] *American Diplomacy* (1951), pp. 91–103.

[13] Op. cit., pp. 3–15.

in the study and exposition of international law and which must be so met if the intellectual foundations of international law are to keep in step with the development of international practice and the needs of the international community.

A similar criticism recurs, moreover, in a more restrained form in the writings of a number of the most distinguished international lawyers of the period which has elapsed since the First World War. Max Huber,[1] Van Vollenhoven,[2] Politis,[3] Kelsen,[4] Georges Scelle,[5] Charles de Visscher,[6] Bourquin,[7] Fischer Williams,[8] Lauterpacht,[9] Jessup,[10] Dickinson,[11] and Corbett,[12] among others, have all, in widely varying degrees and from widely different angles, challenged the adequacy of the existing foundations of international law and existing conceptions of its scope and province.

In the challenge which they have offered to the conception of international law as a law between States solely and exclusively, deriving its validity from the consent of States alone and consisting primarily of rules delimiting their competence, these writers have been able to draw upon an earlier tradition.

Among the founders of modern international law, Vitoria,[13] Suarez[14] and Grotius,[15] to mention only three outstanding names, proceeded each in their several ways upon the hypothesis that 'the individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the well-being and the dignity of the individual human being are a matter of direct concern to international law'.[16] 'Controversies among those who are not held together by a common bond of municipal law', writes Grotius, 'may arise among those who have not yet united to form a nation and those who belong to different nations, both private persons and kings';[1] such controversies are governed by the law of nations which he describes as 'the law which is broader in scope than municipal law'.[2]

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[1] *Die soziologischen Grundlagen des Völkerrechts* (1928).

[2] *The Law of Peace* (1936).

[3] *La Justice internationale* (1924); *Les Nouvelles tendances du droit international* (1927); *La Neutralité et la paix* (1935); *La Morale internationale* (1943).

[4] *General Theory of Law and State* (1945); *Law and Peace* (1942).

[5] *Précis du droit des gens* (1932–34).

[6] *Théories et réalités en droit international public* (1953).

[7] 'Stabilité et mouvement dans l'ordre international', in *Hague Recueil*, 64 (1938), pp. 351–472; 'Pouvoir scientifique et droit international', ibid. 70 (1947), pp. 335–402.

[8] *Chapters on Current International Law and the League of Nations* (1929), pp. 1–85; *International Change and International Peace* (1932); *Aspects of Modern International Law* (1939).

[9] *Private Law Sources and Analogies of International Law* (1927); *The Function of Law in the International Community* (1933); *International Law and Human Rights* (1950).

[10] *A Modern Law of Nations* (1948).

[11] *Law and Peace* (1951).

[12] *Law and Society in the Relations of States* (1951).

[13] *De Indis et de Iure Belli Relectiones* (1696), *Classics of International Law* edition, 1917.

[14] *Tractatus de Legibus ac Deo Legislatore* (1612), Bk. II, ch. 19, § 5.

[15] *De Iure Belli ac Pacis* (1646).

[16] Lauterpacht, 'The Grotian Tradition in International Law', in this *Year Book*, 23 (1946), p. 27.

In Britain this tradition was particularly strong and included among its exponents four of the greatest names among British writers on international law—Phillimore, Maine, Lorimer, and Westlake. Phillimore, though considering that the original and immediate subjects of the laws which govern international relations are States considered in their corporate character,[3] opens his *Commentaries* with a reference to 'the great community, the universal commonwealth of the world';[4] he acknowledges that questions of international jurisprudence 'may be raised in matters affecting the persons and property both of private individuals and of sovereigns and ambassadors—the representatives of States—and of public officers like consuls, but mediately and indirectly, and in so far only as they are members or representatives, or public officers of States';[5] and while drawing a sharp distinction between public and private international law, the second of which he regards as a matter of comity based on social convenience, he treats the two subjects in the same work as 'the two branches of international jurisprudence'.[6] Maine, discussing the origin and sources of international law,[7] points out that 'a great part . . . of international law is Roman law, spread over Europe by a process exceedingly like that which, a few centuries earlier, had caused other portions of Roman law to filter into the interstices of every European legal system'; such a conception of the manner in which international law has developed is much less applicable to a purely formal law concerned almost wholly with defining and delimiting the jurisdiction of States than to a body of international law which represents 'private law writ large'[8] not merely in the sense of applying to the relations of States concepts evolved by private law in respect of the relations of individuals but in the sense that much of its content deals with the same matters as municipal law in so far as they are of wider than municipal concern and is identical in substance with the corresponding rules of municipal law. Lorimer, while describing his *Institutes* as a 'Treatise of the Jural Relations of Separate Political Communities', divides international law into three parts: public, where two States are its subjects; public and private, where a State and a citizen of another State are its subjects; and private, where relations arising out of or dependent on the municipal laws of one State fall to be realized by the municipal laws of another State.[1] Westlake defines international law as 'the law of the society of States as nations';[2] elsewhere he describes it as 'the body of rules prevailing between States' or alternatively as 'the body of rules governing the relations of a State to all outside it, whether other States or private persons not its own subjects'.[3] 'The society of States', he writes, 'is the most comprehensive form of society among men, but it is among men that it exists. States are its immediate, men its ultimate members. The duties and rights of States are only the duties and rights of the men that compose them.'[4]

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[1] *De Iure Belli ac Pacis* (1646), Bk. I, ch. 1, § 1, translation by Kelsey, *Classics of International Law* edition, vol. ii (1925), p. 33.

[2] Ibid., Bk. I, ch. 1, § 14, p. 44.

[3] *Commentaries upon International Law*, vol. i (3rd ed., 1879), p. 10.

[4] Ibid., p. 1.

[5] Ibid., p. 79. Elsewhere he speaks of the Negro and the European having equal rights under international law since 'neither is among the *res positae in commercio* in which it is lawful for States or individuals to traffic': ibid., pp. 402–3.

[6] Ibid., pp. 12–13.

[7] *International Law* (The Whewell Lectures, 1887) (1888), p. 20.

[8] Holland, *Studies in International Law* (1898), p. 151.

A generation ago there was a tendency to regard these expressions as survivals of a natural law heritage. The suggestion that there was any special relationship between public and private international law was vigorously criticized by public and private international lawyers alike.[5] The one was a law governing the relations between States; the other the part of the municipal law of each country dealing with matters governed in some respect by foreign law. No provision was made in the general theory of international law for any other type of international legal relationship.

Although it has now become a commonplace that the view that international law consists exclusively of the rules governing the mutual relations of States has ceased to reflect the realities of current international life, little progress has been made towards securing any general agreement upon a new definition of the scope, province, and content of international law in the absence of which the newer developments cannot be satisfactorily presented as elements in a coherent system. It is not to be expected that such agreement will be readily or easily secured. There is likely to be considerable divergence of view on the subject and a long period of exploration and definition may be required before any substantial measure of agreement is reached. The present article is but one of the many contributions to this process of exploration and definition which will be required for the purpose of formulating in a generally acceptable manner on the basis of current practice the alternative conception that international law represents the common law of mankind in an early stage of its development and comprises a number of main divisions of which the law governing the relations between States is only one. Such a task is clearly one to be approached with the greatest humility. Professional opinion has shown a pronounced tendency to be suspicious of suggestions for the renascence[1] or renovation[2] of international law, of emphasis upon a new international law[3] or the new aspects of international law,[4] and of the formulation of new branches or categories of international law, such as international criminal law,[5] international commercial law,[6] international economic law,[7] international financial law,[8] international tax law,[9] or international equity;[10] a number of these suggestions and categories rest upon debatable or ill-defined concepts and represent verbal innovations rather than a solid rethinking of the structure of the law; partly for this reason, they have too often appeared to be vehicles for the views of particular writers rather than objectively valid contributions to a more satisfactory organization and exposition of international law as a whole. International aviation law, international maritime law, international labour law, and international sanitary law have secured a wider, though still limited, measure of acceptance as recognized branches of international law, partly because they have been less identified with the views of particular writers but chiefly, no doubt, because they have a more definable scope and, as the result of the existence of a large number of widely ratified conventions and other international instruments, a more precise content. This widespread hesitation to recast the traditional structure of the law is both natural and healthy. Stimulating as they may sometimes be, eccentricities of exposition—from either the right[11] or the left[12] —can make little permanent contribution to the problem of definition and arrangement which confronts us. But the task is nevertheless both an essential and an urgent one. The question is not one of modifying or developing the substantive content of the law. The impact of events has in large measure already produced, and will continue to produce at an accelerating rate, the changes in the substantive content of the law which are required. The conclusion of a large number of law-making treaties, of which a considerable number have been widely, and a few almost universally, ratified, has already had an impact on the law of nations comparable to that which the economic and social legislation of modern times has had on municipal law. The existence of the United Nations and twelve specialized agencies and of a multiplicity of regional and other intergovernmental organizations, many of which have regulative, quasi-judicial, and executive functions which have a significant bearing on the development of international law, has been an equally important, and potentially even more far-reaching, influence. The crux of our present problem is that the profound transformation of the law already achieved in practice, which is proceeding continuously, though generally recognized and welcomed by contemporary international lawyers, has not been sufficiently assimilated into their instinctive thinking to reflect itself adequately in either the general theory of international law or the traditional organization of the subject for purposes of exposition.

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[1] *The Institutes of the Law of Nations*, vol. i (1883), pp. 4–5.

[2] *International Law*, Part I, 'Peace' (2nd ed., 1910), p. 1.

[3] *Chapters on the Principles of International Law*, (1894) reprinted in *Collected Papers* (1914), p. 1.

[4] Ibid., p. 78.

[5] E.g., Oppenheim's *International Law* (4th ed. by McNair, vol. i, 1928), p. 5; Holland, *Lectures in International Law* (1933), pp. 47–53; Brierly, *The Outlook for International Law* (1944), p. 9; Cheshire, *Private International Law* (2nd ed., 1938), pp. 11–12; Beale, *The Conflict of Laws* (1935), vol. i, pp. 1–8 and 51–53.

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[1] Nathan, *The Renascence of International Law*, Grotius Society Publications, No. 3 (1925).

[2] Jitta, *The Renovation of International Law* (1919).

[3] Alvarez, *La reconstrucción del derecho de gentes. El nuevo orden y la renovación social* (1944).

[4] Politis, *Les Nouvelles tendances du droit international* (1927).

[5] Fiore, *Traité de droit pénal international* (1880); Travers, *Le Droit pénal international* (1920–1922); Pella, *La Criminalité collective des états et le droit pénal d'avenir* (1926).

[6] Travers, *Le Droit commercial international* (1932–1938).

[7] Schwarzenberger, 'The Development of International Economic and Financial Law by the Permanent Court of International Justice', in *Juridical Review*, 54 (1942), pp. 21–40 and 80–100.

[8] See Sack, *Les Effets des transformations des états sur les dettes publiques* (1927), and the criticism thereof in Feilchenfeld, *Public Debts and State Succession* (1931), pp. 591–9.

[9] Udina, *Il Diritto Internazionale Tributario* (1949).

[10] E.g., Friedmann, *The Contribution of English Equity to the Idea of an International Equity Tribunal* (1935).

[11] E.g., Baty, *The Canons of International Law* (1930).

[12] E.g., Stowell, *International Law—A Re-statement of Principles in Conformity with Actual Practice* (1931).

There is, of course, no answer to the proposition that in a purely formal sense the whole body of international law consists of law governing the relations between States in so far as States are the constituent units of the international legal order and exercise legislative, judicial, and custom-creating authority within it either directly or through international bodies to which they have entrusted a measure of such authority. This proposition can be challenged only by a complete reversion to natural law concepts, or some variant thereof, going far beyond the healthy reaction which has already occurred in the direction of giving fuller recognition to natural law, private law analogies, and similar sources as leavening influences in the progressive development of the law by the growth of custom and notably by arbitral and judicial decision;[1] a reversion to natural law concepts on such a scale would be unsound in theory and unworkable in practice. But while the proposition that international law governs the relationships between States may, in this purely formal sense, be unanswerable, this represents a purely formalistic view of the position which has little relation to the current content of international law, much of which deals in practice with legal relationships which are by no means exclusively, and are not always primarily, relationships between States.

In analysing the content of the working international law of the contemporary world, we must necessarily assign an important place to the provisions of widely ratified international conventions. On so doing, we shall find that the emphasis of the law is increasingly shifting from the formal structure of the relationships between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its member States. We shall also find that as the result of this change of emphasis the subject-matter of the law increasingly includes cross-frontier relationships of individuals, organizations, and corporate bodies which call for appropriate legal regulation on an international basis, problems of economic and technological interdependence requiring the regulation on the basis of common rules of matters which do not *per se* involve inter-State relations in any real sense, and rights designed to provide the individual, and in some cases organizations, with a measure of protection against the individual member States of the international community. This international community, which is still far from having attained any political or moral unity and is always liable to be torn asunder by disruptive forces, continues to be organized on the basis of States, but its law has long since ceased to be merely, and is rapidly ceasing to be primarily, a law between States. As Brierly has so happily put it, 'this characteristic, though international lawyers have sometimes been inclined to erect it into an immutable dogma, is really a survival from the original character of international law as a law between personal monarchs or sovereigns'.[1]

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[1] Lauterpacht, *Private Law Sources and Analogies of International Law* (1927); and *The Development of International Law by the Permanent Court of International Justice* (1934).

Viewed in this perspective, the contemporary public international law of peace may be regarded as comprising eight main divisions: (*a*) the law governing the structure and law-making processes of the international community, with four major subdivisions, namely, (i) the law governing the existence, recognition, and succession of States as elements in the structure of the international community, (ii) the law of international institutions, (iii) the law governing the law-making processes of the international community, and (iv) the relation of international to municipal law; (*b*) the law governing the relations between States, which includes (i) the rules concerning territory, the freedom of the seas and sovereignty of the air, jurisdiction, the responsibility of States, intercourse between States, immunities, and similar subjects which constitute the traditional core of the public international law of peace, including nationality, the reception of aliens, extradition and co-operation in restraint of crime as matters between States; (ii) rules governing economic relations between States covering such questions as obligations of consultation and mutual co-operation in respect of monetary and general economic policy, the liability of one State to another in respect of loss or damage of an economic character, and financial transactions between States; and (iii) the rights of States in respect of the application and enforcement of the parts of the law which relate primarily to individuals; (*c*) human rights protected by international guarantees, including civil liberties and political, economic, and social rights; (*d*) property rights of a distinctively international character, including incorporeal forms of property such as copyright and patents and certain contractual and other financial claims; (*e*) common rules established by international instruments which do not apply primarily to inter-State relations, a division which comprises a large part of the content of modern law-making treaties and covers the whole range of economic and technological inter-dependence, including aviation, much of maritime law, postal matters, sanitary regulations, telecommunications, and a host of similar matters governed by international rules applicable to public services, corporations and individuals rather than to States; (*f*) international rules governing the conflict of laws; (*g*) the law of treaties and other international instruments, including the conclusion, validity, effect, interpretation, termination, and modification of such instruments; and (*h*) the law governing international arbitration and judicial settlement, including jurisdiction, procedure, interim measures of protection, evidence, damages, and the execution of decisions and awards. While these divisions are convenient for purposes of analysis and exposition, there are inevitably many subjects which fall partly in one division and partly in another.

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[1] *The Outlook for International Law* (1944), p. 108.

The significance of each of these divisions for the further development of international law as the law of 'the great community, the universal commonwealth of the world'[1] of which States may be the 'immediate' but men are the 'ultimate members'[2] calls for some explanatory comment. It is proposed to discuss the matter from three points of view: firstly, the nature and range of the problems which these various divisions present for the contemporary development of international law; secondly, the extent to which, in the current presentation of international law, they are treated adequately and in a context which expresses appropriately their relationship to the legal system as a whole; and, thirdly, the significance of their contribution to the transformation of international law from a law governing the mutual relations of States into the common law of mankind. As an exhaustive survey of the literature on the subject is impracticable and isolated illustrations of the manner in which these various topics are dealt with in the leading treatises would be of debatable value, it will be necessary to use rather broad generalizations somewhat freely and to be illustrative rather than complete, and provocative rather than authoritative. Most of the suggestions which will be made in the course of discussing the matter are far from new; but it is believed that the time is ripe for a new attempt to reassess in empirical rather than abstract terms their cumulative importance for the general theory and structure of the law.

The structure and law-making processes of the international community

General theories concerning the structure and law-making processes of the international community have, by reason of the fundamental nature of the questions which they involve, always exercised a special fascination for international lawyers, and have frequently claimed a measure of attention which the common lawyer has generally found to be both unnecessary and uncongenial. There can, however, be no question that some account of these matters is the natural and necessary starting-point for any coherent and rational presentation of the general body of international law.

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[1] Phillimore, *Commentaries upon International Law*, vol. i (3rd ed., 1879), p. 1.

[2] Westlake, *Collected Papers* (1914), p. 78.

The law governing the nature, existence, recognition, and succession of States

As the international community is organized on the basis of States, and States constitute the membership of the international organizations through which it is progressively achieving an institutional framework, it is appropriate and convenient that the exposition of international law should begin with the law governing the nature, existence, recognition,[1] and succession of States.[2] In this respect, no change in the traditional approach to the organization of the subject is necessary, but the substance of the law on these matters has already been profoundly transformed and the process of transformation is still far from complete. The concept of sovereignty, though frequently reasserted, especially by new and newly influential members of the international community, has already clearly evolved from one of freedom from external control to one of full status in, but subject to, the law,[3] and this new conception has received an increasing measure of recognition in the judgments and opinions of the International Court.[4] The concept of the equality of States, while still variously interpreted and widely entertained in its most extreme and comprehensive form, continues to evolve towards one of equal protection of the law rather than of an equality of rights and functions which would make impossible any progress in international organization.[5] The qualifications for statehood for international purposes and the law relating to composite international persons have presented new problems at successive phases of the development of the British Commonwealth of Nations,[6] the French Union, the Netherlands Union, and the U.S.S.R., and developments in British African territories, in the French Union, in the relations of the Netherlands with the Netherland Antilles and Surinam, and in the Asian borderlands of China make it clear that the process of development as the result of which the present members of the Commonwealth have reached full statehood is far from complete and that new forms of both intermediate and composite international status may develop. The development of regional groupings of States and supra-national communities[1] is a converse phenomenon which may in course of time affect considerably the nature and quality of statehood in international law. In the field of recognition of States and governments the latent conflict between the established practice of recognition by the individual and unco-ordinated action of States whose policies and views of the legal interpretation to be placed on particular facts may diverge widely and the need for a collectivization of the process of recognition[2] has been made acute by the occurrence in the United Nations and other international organizations of cases, notably that of China from 1950 onwards, in which there has been a protracted difference of view concerning the rival claims of competing governments to represent the Member State concerned in such organizations; the resulting situation in which certain governments recognize one government for the purpose of their individual relations with a State and in effect recognize another government for the purpose of such relations as they maintain with that State through the collective machinery of international organizations, makes it impossible for either their individual or their collective policies on the subject to be effective and raises serious questions concerning the future of the law of recognition. The emergence during and since the Second World War of a considerable number of new States in the Middle East and South-East Asia, and the prospective emergence of further new States in South-East Asia and Africa, have produced a new crop of problems of State succession which arise in a political, economic and social context differing considerably from that in which the late-nineteenth and early-twentieth-century law on the subject[3] took shape; in these circumstances, important aspects of the law of State succession have been or are in process of being reconsidered,[4] and such reconsideration appears to be particularly urgent in regard to State succession in respect of law-making treaties.[5] While, therefore, the law governing the nature, existence, recognition, and succession of States retains its place as the natural introduction to the general body of international law, the substantive law on these subjects diverges widely from that of a generation ago; the tendency of most of the changes which have occurred has been to bring the law on these topics within the framework of the law of an organized community, and it is of vital importance that this tendency should be fully reflected in the general exposition of international law.

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[1] Lauterpacht, *Recognition in International Law* (1947); Chen, *The International Law of Recognition* (1951).

[2] O'Connell, *The Law of State Succession* (1955); de Maralt, *The Problem of State Succession with regard to Treaties* (1954); Castren, 'Aspects récents de la succession des états', in *Hague Recueil*, 78 (1951) (i), pp. 385–505.

[3] E.g., Politis, 'Le Problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux', in ibid. 6 (1925) (i), pp. 5–117; Van Kleffens, 'Sovereignty in International Law', ibid. 82 (1953) (i), pp. 5–130; Loewenstein, 'Sovereignty and International Co-operation', in *American Journal of International Law*, 48 (1954), pp. 222–44.

[4] Hambro, *The Case Law of the International Court* (1952), paras. 20, 71, 74, 109, 155, and 174; cf. also Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 89–107.

[5] Dickinson, *The Equality of States in International Law* (1920); Weinschel, 'The Doctrine of Equality of States and its Recent Modifications', in *American Journal of International Law*, 45 (1951), pp. 417–42.

[6] Noel-Baker, *The Present Juridical Status of the British Dominions in International Law* (1929); Noel-Baker and Fawcett, *The British Commonwealth in International Law* (1955).

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[1] Reuter, *La Communauté européenne du charbon et de l'acier* (1953).

[2] Lauterpacht, *Recognition in International Law* (1947), pp. 77–78, 165–9, 253–5, and 400–3; Aufricht, 'Principles and Practices of Recognition by International Organizations', in *American Journal of International Law*, 43 (1949), pp. 679–704.

[3] As illustrated, for instance, in Keith, *Theory of State Succession* (1907).

[4] O'Connell, *The Law of State Succession* (1955).

[5] Jenks, 'State Succession in respect of Law-Making Treaties', in this *Year Book*, 29 (1952), pp. 105–44.

The law of international institutions

It is perhaps not unnatural that the law of international institutions, in so far as it is dealt with at all in general works on international law (and it is still not uncommon to dismiss it as a branch of political science), tends to be regarded as an accretion to the historical structure of the law for which there is no well-defined logical place within that structure. Oppenheim struck the keynote of a new approach by including in his discussion of the subjects of the law of nations a chapter dealing with the League of Nations as the organized family of nations, but though it has become increasingly common for writers to emphasize that effective international organization is a necessary foundation for the further development of international law, it still remains to draw from this the logical and necessary conclusion that the exposition of contemporary international law should, after giving the necessary historical introduction to the subject and examining the place of international law in general jurisprudence and the role of the State as a basic element of the international community, start from the fact of international organization, give a picture of the complex structure of contemporary international organization as an essential part of the framework of current international relations and the present-day development of international law, and give the law of international institutions a prominence and adequacy of treatment commensurate with its importance as the law governing the constitutional framework of a developing world community. Such an approach implies that the law of international institutions should constitute an essential part of the first major division of any systematic treatment of contemporary international law and should embrace the totality of such institutions and not merely the general organization responsible for the maintenance of peace and security. Peace and security are the foundation of international, as of national, life, but the scope of international law, as of law in general, has widened in response to modern needs, and any presentation of the institutional framework of the world community which ignores or underestimates either the importance or the vitality of the functional and regional complexity of its structure affords a misleading basis for understanding and developing the contemporary law of nations. The successive editions of Oppenheim have represented a series of important stages in the recognition of the importance of these considerations but the process is still far from complete. The same tendency is apparent in successive editions of Brierly's *Law of Nations*, in which, since the second edition, a chapter on the legal organization of international society has followed immediately after introductory chapters on the origin of international law and the character of the modern system of international law.[1]

The law of international institutions falls conveniently into a number of subdivisions which may be described as the constitutional law of international organizations, the parliamentary law of international organizations, the administrative law of international organizations, and the law governing the mutual relations of international organizations. These may well be of unequal intrinsic importance and are certainly at different stages of development; but they represent a convenient arrangement of the subject as a whole.

The constitutional law of international organizations covers the membership, structure, competence, powers, basic procedures and legal status of international organizations, the general principles governing their mutual relations and their relations with States and individuals, and the arrangements for the modification and interpretation of their constitutions.[2] In the general structure of international law this part of the law of international institutions holds a place comparable to that of constitutional law in municipal legal systems. It has developed rapidly in recent years and calls for far more intensive study in relation to general international law than it has yet received. This branch of the law includes, in addition to the basic constitutional texts, a large and growing body of constitutional practice. The constitutional practice of the League of Nations[3] is still of practical as well as historical interest in a number of respects. The constitutional law of the United Nations alone is now a complex subject calling for much closer study by international lawyers,[4] and the comparative constitutional law of international organizations remains a lightly tilled field.

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[1] See, for instance, 4th ed. (1949), pp. 85–110. Some recent textbooks, notably those of Schwarzenberger (*Manual of International Law* (1947), pp. 107–29 and 304–9) and Starke (*An Introduction to International Law*, 3rd ed. (1954), pp. 423–80), include sections on the law of international institutions generally, but fall short of giving a picture of the international community as consisting of States organizing themselves by means of institutions to meet the needs of individuals—the only picture which faithfully reflects contemporary realities. See also Kunz, 'General International Law and the Law of International Organizations', in *American Journal of International Law*, 47 (1953), pp. 456–62.

[2] For a general outline of the subject see Jenks, 'Some Constitutional Problems of International Organizations', in this *Year Book*, 22 (1945), pp. 11–72.

[3] Schücking and Wehberg, *Die Satzung des Völkerbundes*, 2nd ed. (1924); Ray, *Commentaire du Pacte de la Société des Nations* (1930–5); Geneva Research Centre, *Répertoire of Questions of General International Law before the League of Nations*, by Schiffer (1942).

[4] Cf. Goodrich and Hambro, *The Charter of the United Nations*; Kelsen, *The Law of the United Nations* (1950); Feller, *The United Nations and the World Community* (1952). A Digest of the Constitutional Practice of the United Nations is in course of preparation and a first volume has appeared under the title United Nations, *Repertory of Practice of United Nations Organs* (1955); see also United Nations, *Répertoire of the Practice of the Security Council, 1946–1951* (1954).

The parliamentary law of international organizations has attracted very little attention and still awaits its Erskine May[1] or Jefferson's *Manual*,[2] but a large body of parliamentary practice has now developed in the various international organizations. Differences in the composition, functions and methods of work of different bodies are necessarily reflected in differences in their rules of procedure and parliamentary practice, but most of the existing rules are based on a relatively small number of models,[3] and the elements of an accepted body of parliamentary law for international organizations involving innumerable compromises between the widely differing parliamentary traditions of, for instance, the United Kingdom, the United States, the Latin countries, and the U.S.S.R. are gradually emerging. While the details of international parliamentary practice, and particularly those of the comparative parliamentary practice of a functionally decentralized international community, are no more appropriate for treatment in a general exposition of international law than the details of the parliamentary practice of the United Kingdom would be appropriate for discussion in Anson,[4] the subject should not continue to be completely ignored but should receive a measure of attention comparable to that which Anson gives to parliamentary procedure[5] in his presentation of the law and custom of the Constitution. The development of an adequate and generally accepted body of parliamentary law is as fundamental for the effective conduct of business in international organizations as in national legislative bodies, and presents special difficulties owing to the need to combine diplomatic and parliamentary methods in order to evolve practically satisfactory arrangements for conducting international business. While the more systematic study of rules and precedents which is necessary is primarily a matter for the specialist, some major points, such as the functions and limitations of majority decision in international bodies and the authority of the chair in determining procedure in international bodies, have a degree of practical importance calling for mention (if only as illustrations of problems which are far from solved) in a general exposition of the parliamentary law of international organizations. In British parliamentary practice the authority and impartiality of the Speaker is taken so much for granted that its fundamental importance for the working of parliamentary institutions is readily overlooked. The parliamentary practice of international organizations has not reached the stage of development at which such a tradition can be taken for granted, and these are matters of considerably greater significance for the future of international law and organization than the niceties of diplomatic procedure and ceremonial which have so often found, and to a lesser extent still find, a place in the textbooks of international law. The parliamentary law of international organizations defines, limits and protects the rights of the representatives of States, together with those of other participants in international bodies; only in this indirect and somewhat artificial sense can it be regarded as a law between States; but it none the less constitutes an essential element in contemporary public international law.

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[1] *Law, Privileges, Proceedings and Usage of Parliament*, 15th ed. by Campion and Cocks (1950).

[2] Campion, *European Parliamentary Procedure* (1953), is designed for the guidance of inter-parliamentary bodies like the Consultative Assembly of the Council of Europe; a similar manual for international deliberative bodies generally is highly desirable to supplement the standard works on diplomatic practice such as Ch. de Martens, *Guide Diplomatique* (1860), Pradier-Fodéré's *Cours de droit diplomatique* (1899), Genet, *Traité de diplomatie et de droit diplomatique* (1931), and Satow, *A Guide to Diplomatic Practice*, 3rd ed. by Ritchie (1932). Pastuhov, *A Guide to the Practice of International Conferences*, is extremely useful on questions of conference organization, but a more systematic treatment of parliamentary procedure in international deliberative bodies is overdue.

[3] Notably the Rules of Procedure of the League of Nations and the International Labour Organization and more recently the United Nations and, for bodies of an inter-parliamentary character, the Consultative Assembly of the Council of Europe.

[4] *Law and Custom of the Constitution*, 5th ed. by Gwyer (1922), vol. i, 'Parliament'.

[5] Ibid., pp. 263–321.

The administrative law of international organizations includes the law governing their financing and financial administration and the law governing their relationships with their staffs; it may also be convenient to deal under this head with other legal relationships between international organizations and individuals,[1] with the immunities of international organizations and their staffs, and with judicial redress against decisions of international bodies. While there may well be scope for the development on a conventional or customary basis of new rules of law governing the financial relationships of international organizations with their members comparable in importance to the law governing the financial structure of federal States,[2] the existing law on the subject consists primarily of the rules governing financial administration embodied in the financial regulations of the various organizations and the rules of procedure evolved by the Joint Panel of External Auditors of the United Nations and the Specialized Agencies. The law governing the relationships of international organizations with their staffs, while consisting in a similar manner primarily of the administrative regulations of the various organizations, also includes a rapidly growing body of case law enunciated by the Administrative Tribunals of the League of Nations, the United Nations and the International Labour Organization.[3] The legal relations between international organizations and their staffs attracted relatively little attention until certain aspects thereof were submitted to the International Court of Justice for an advisory opinion in the *Reparation for Injuries Suffered in the Service of the United Nations* case,[1] and the whole matter was thrust into an unhappy prominence by the controversy in the United States concerning alleged subversive activities by members of the Secretariat of the United Nations,[2] and the subsequent reference to the International Court of the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* case.[3] International immunities have always commanded wider attention,[4] partly no doubt because of their potential bearing on third party interests, but chiefly because the analogy with diplomatic immunities brought them within the traditional range of international lawyers. Important as these immunities are as a guarantee of the independence of international organizations from national control, they represent in practice only one element in the administrative law of international organizations, and when they are taken out of their proper context their significance and effect is frequently misunderstood. The desirability or otherwise of making fuller provision for judicial redress against decisions of international bodies has attracted growing attention in recent years,[5] probably prematurely;[6] discussion of the subject tends to be coloured by analogies drawn from relatively recent developments in national procedures of judicial redress against executive action,[7] whereas the development of international organizations is at a much earlier stage; there can, however, be little question that fuller provision for such redress in appropriate cases should at the proper stage of development take its place as an important branch of the administrative law of international organizations. The administrative law of international organizations deals partly with the relations of such organizations with States and partly with their relations with individuals; it is therefore not in any direct sense a law between States, but it is none the less an essential element in contemporary public international law.

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[1] McKinnon Wood, 'Legal Relations between Individuals and a World Organization of States', in *Transactions of the Grotius Society*, 30 (1944), pp. 141–64.

[2] Cf. Jenks, 'Some Legal Aspects of the Financing of International Institutions', ibid. 28 (1942), pp. 87–132.

[3] See, for instance, Siraud, *Le Tribunal administratif de la Société des Nations* (1942); Langrod, 'Le Tribunal administratif des Nations Unies', in *Revue de droit public at de la science politique en France et à l'étranger*, 1951, pp. 71–104; and Wolf, 'Le Tribunal Administratif de l'Organisation internationale du Travail', in *Revue générale de droit international public*, 1954, No. 2.

The law governing the mutual relations of international organizations has become of substantial practical importance in recent years as the result of the development of a functionally and regionally decentralized form of international organization,[1] and an understanding of the main principles on which it is based has become important for an understanding of the law of international institutions generally. The current law on the matter is to be found mainly in the Charter of the United Nations, the constituent instruments of the other international organizations, the numerous agreements concluded between international organizations, the rules of procedure of various international bodies, and a number of miscellaneous instruments and regulations; it appears probable that these will be supplemented in course of time by a considerable body of custom and practice, but the whole process is still in a very early phase of development. While this body of inter-organizational law may affect the relations between States and in certain cases involve obligations for States which, in their capacity as members of the various organizations, are presumably bound by the obligations which these undertake towards each other within the limits of their authority, it is not in any true sense a law between States but a law regulating the mutual relations of the collective organs of the community of States; it is, perhaps even more obviously than the parliamentary and administrative law of international organizations, none the less an essential element in contemporary public international law.

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[1] *I.C.J. Reports*, 1949, pp. 174–220.

[2] Schwebel 'The International Character of the Secretariat of the United Nations', in this *Year Book*, 30 (1953), pp. 71–115.

[3] *I.C.J. Reports*, 1954, pp. 47–97.

[4] See, for instance, *Annuaire de l'Institut de Droit International*, 31 (1924), pp. 1–19, 76–126, and 179–80; Hurst, 'Diplomatic Immunities and Modern Developments', in this *Year Book*, 10 (1929), pp. 6–10; Secrétan, 'The Independence granted to Agents of the International Community in their relations with National Public Authorities', ibid. 26 (1935), pp. 56–78; Hammarskjöld, 'Les Immunités de personnes investies de fonctions internationales', in *Recueil des Cours*, 56 (1936) (ii), pp. 111–211; Hill, *Immunities and Privileges of International Officials* (1947); Croswell, *Protection of International Personnel* (1952); Kunz, 'Privileges and Immunities of International Organizations', in *American Journal of International Law*, 41 (1947), pp. 828–62.

[5] See *Annuaire de l'Institut de Droit international*, vol. 44 (i) (1952), pp. 224–360, vol. 45 (i) (1954), pp. 265–309; Valentine, *The Court of Justice of the European Coal and Steel Community* (1955).

[6] Cf. Jenks in *Annuaire de l'Institut de Droit International*, vol. 45 (i) (1954), pp. 302–8.

[7] Cf. Hamson, *Executive Discretion and Judicial Control* (1954); Street, *Governmental Liability* (1953); Alibert, *Le Contrôle juridictionnel de l'administration* (1926).

It will no doubt be contended that the law of international institutions is still so fragmentary and in some respects still so precarious that it cannot yet appropriately be given so central a place in the exposition of international law as a whole and that some of the above subdivisions are not, in their present stage of development, of sufficiently general interest to find a place in such an exposition. It is believed that this view underestimates the developments which have occurred in the law of international institutions and their significance for international law as a whole, and that, while it may be a valid reason for not giving undue emphasis to matters such as the parliamentary and administrative law of international organizations in elementary treatments of the subject, it is in any case irrelevant to an appraisal of the most satisfactory long-term approach to the problem of redefining the scope and content of international law on the basis of modern needs and the trend of future development.

The law-making processes of the international community

In the examination of the law-making processes of the international community—a topic which corresponds to national discussions of the respective roles of custom, judicial precedent, doctrinal discussion and legislation in legal evolution[1]—a number of questions call for special examination in the light of contemporary developments, notably the frequency with which apparently well-established customary law is challenged by new or newly influential members of the international community, the extent to which the collective practice of States expressed through international organizations is now a significant element in the growth of custom, the effect of the regulative and quasi-judicial powers of international organizations, the relationship of the law-making treaty to the general body of international law, the role of judicial and arbitral decisions, national and international, in the contemporary development of the law, and the prospects for the codification of international law.

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[1] Cf. Jenks, 'Co-ordination: A New Problem of International Organisation', in *Recueil des Cours*, 77 (1950) (ii), pp. 157–301; 'Co-ordination in International Organisation: An Introductory Survey', in this *Year Book*, 28 (1951), pp. 29–89; and 'The Conflict of Law-Making Treaties', ibid. 30 (1953), pp. 401–53.

Nineteenth-century treatises on international law frequently included a section on the dominion of the law of nations which discussed the extent to which international law was applicable outside the pale of Western Christendom.[2] The problem of the universality of international law has now assumed a new form. The community of international law now covers the whole world but there is grave danger that the extension of the membership of the community may be accompanied by a dilution of the content of its law. One of the issues in the ideological cleavage between the democratic world and successive totalitarian systems is the nature of law itself,[3] and nations which have newly won or re-won their political or economic independence or which for historical reasons retain a psychology of newly won independence naturally bring to international life new problems and a new outlook on old problems, and they are sometimes inclined to take a high view of the prerogatives of sovereignty.[4] Confronted with this double challenge, the authority of the existing customary international law has been strained, particularly since the greater part of the evidence of accepted custom habitually relied upon by international lawyers relates to the customary practice of the original members of the international community whose authority in every sphere the new and newly influential members of the community are inclined to challenge. In these circumstances, there is an urgent need to marshal the evidence of existing customary law on a much wider geographical basis[1] and progressively to secure a more broadly based and fuller acceptance of both established and developing custom; only so can the existing customary law be protected against an ever-present danger of disintegration.

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[1] Cf. Allen, *Law in the Making*, 5th ed., (1952).

[2] E.g. Wheaton, *History of the Law of Nations* (1845), pp. 555–6; *Elements of International Law*, 8th ed. by Dana (1866), pp. 17–18; Creasy, *First Platform of International Law* (1876), pp. 129–34; Twiss, *The Law of Nations—Rights and Duties in Time of Peace* (1892), pp. 88–124; and cf. Ward, *Law of Nations in Europe* (1795), vol. ii, pp. 321–37, and Phillimore, *Commentaries upon International Law*, 3rd ed. (1879), vol. i, pp. 83–93, who foreshadow the modern principle of the universality of international law.

[3] See, for instance, Taracouzio, *The Soviet Union and International Law* (1935); Krylov, 'La Doctrine soviétique du droit international', in *Recueil des Cours*, 70 (1947) (i), pp. 411–74; Calvez, *Droit international et souveraineté en l'U.R.S.S.* (1953); Lapenna, *Conceptions soviétiques du droit international public* (1954); and cf. Schlesinger, *Soviet Legal Theory* (1945); Babb and Hazard, *Soviet Legal Philosophy* (Twentieth Century Legal Philosophy Series) (1951); Hazard, *Law and Social Change in the U.S.S.R.* (1953); Guins, *Soviet Law and Soviet Society* (1954); Kelsen, *Communist Theory of Law* (1955).

[4] See, for instance, for Latin America: *A Study of the Philosophy of International Law as seen in the Works of Latin-American Writers* (1954); for the Islamic World: Rechid, 'L'Islam et le droit des gens', in *Recueil des Cours*, 60 (1937) (ii), pp. 375–505; Hamidullah, *The Muslim Conduct of State* (1945); Majid Khadduri, *Law of War and Peace in Islam*, (1940); Schacht, *The Origins of Mohammedan Jurisprudence*, (1950); for Persia: Khabiri, *International Law* (1953); for India: Viswanatha, *International Law in Ancient India* (1925); Sastry, *Studies in International Law* (1952); Mukherjee, *International Law Redefined* (1954); for China: Chen, *The Science of International Law* (1954); Sui-Tschoan-Pao, *Le Droit des gens et la Chine antique* (1925).

Happily, this uncertain status of established custom is counter-balanced by a number of positive influences which are rapidly enriching and transforming the law. The extent to which the collective practice of States expressed through international organizations may contribute to the growth, and particularly to the more rapid consolidation, of custom calls for a discriminating appraisal. On the one hand, it is clear that a vote adopted by a chance majority in an international conference for political reasons on a matter which the conference has no authority to decide has little value as precedent for the purpose of determining accepted international custom;[2] at the other extreme it is equally clear that a generally accepted course of practice in international organizations can properly be regarded as having crystallized into binding custom after a reasonable period; the difficulties arise, as in respect of the more traditional modes of the development of custom, in the intermediate cases.

The impact of the law-making treaty is more immediate and in some respects more readily measurable; but while the part played by the law-making treaty in transforming the scope and content of international law is widely conceded,[3] the extent to which principles of the law of treaties which were evolved primarily with reference to bilateral treaties of a purely contractual character are applicable to the law-making treaty remains open to debate,[4] and the imperfections of current legislative technique and the opportunities which the scale and frequency of current legislative action present for improving that technique by sustained attention to detail[5] attract far less interest than their importance warrants.

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[1] Cf. United Nations, International Law Commission, 1949, *Ways and Means of Making the Evidence of Customary International Law More Readily Available*, United Nations Publication No. 1949, V. 6.

[2] Cf. Fitzmaurice, 'The United Nations and the Rule of Law', in *Transactions of the Grotius Society*, 38 (1952), pp. 135–50.

[3] Cf. Hudson, *International Legislation* (1931), vol. i, pp. xiii–lx, Introduction; McNair, 'International Legislation', in *Iowa Law Review*, 19 (1934), No. 2, pp. 177–89.

[4] E.g., McNair, 'The Functions and Differing Legal Character of Treaties', in this *Year Book*, 11 (1930), pp. 100–18; Hurst, 'The Effect of War on Treaties', ibid. 2 (1921–2), pp. 37–47; Jenks, 'State Succession in respect of Law-Making Treaties', ibid. 28 (1952), pp. 105–44.

[5] See Jenks, 'Les Instruments internationaux à caractère collectif', in *Recueil des Cours*, 69

The growing importance of the regulative and quasi-judicial powers entrusted to certain international organizations is less widely appreciated. The latter are of particular importance as the source of a body of case law, analogous to the decisions of administrative tribunals for particular purposes, which now covers a wide range of subjects and is developing rapidly. The International Monetary Fund interprets and applies its Articles of Agreement in a manner binding upon its members;[1] some of the interpretations given are designed essentially to govern proceedings in national courts and have a direct bearing on private rights.[2] The International Labour Office has for many years given what are in effect advisory opinions to governments concerning the interpretation of international labour conventions;[3] the Governing Body of the I.L.O., when examining representations and complaints concerning the application of conventions, adopts reports which constitute the germ of a case law on the subject;[4] and the Freedom of Association Committee of the I.L.O., which in March 1955 had examined 116 cases of allegations of infringements of freedom of association involving 43 countries, 19 non-metropolitan territories, and 2 areas subject to special international arrangements, has built up an elaborate body of case law covering numerous aspects of freedom of association for trade union purposes.[5] The World Health Organization, in the course of applying the International Sanitary Regulations, settles questions and disputes relating to quarantine.[6] The International Bureau of the Universal Postal Union gives opinions on questions in dispute between postal administrations and in non-litigious cases relating to the interpretation of the international postal regulations.[7] The decisions of the Contracting Parties

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(1939), pp. 451–543; 'The Need for an International Legislative Drafting Bureau', in *American Journal of International Law*, 39 (1945), pp. 163–79; Reiff, 'A Form Book for Standard Treaty Clauses', ibid. 40 (1946), pp. 640–4.

[1] International Monetary Fund, *Annual Report*, 1946, pp. 105–7; 1947, pp. 78–79; 1948, pp. 66–72 and 97–99; 1949, pp. 81–83; 1950, pp. 99–101 and 118–19; 1951, pp. 85–86; *Summary Proceedings of Ninth Annual Meeting*, 1954, pp. 135–80.

[2] Gold, 'The Fund Agreement in the Courts', in International Monetary Fund, *Staff Papers*, vol. i, No. 3 (1951), pp. 315–33, vol. ii, No. 3 (1952), pp. 482–98, and vol. iii, No. 2 (1953), pp. 290–312.

[3] These opinions are embodied in the annotations to *The International Labour Code, 1951*, vol i; see also Jenks, 'The Interpretation of International Labour Conventions by the International Labour Office', in this *Year Book*, 20 (1939), pp. 132–41.

[4] See Jenks, ibid. 18 (1937), pp. 163–65, and 19 (1938), pp. 228–30.

[5] See Jenks, 'The Protection of Freedom of Association by the International Labour Office', ibid. 28 (1951), pp. 348–59, and in *Recueil des Cours*, 1955; for the texts of the reports of the Committee see *Sixth Report of the I.L.O. to the United Nations*, 1952, pp. 169–237, *Seventh Report*, 1953, pp. 173–396, *Eighth Report*, 1954, pp. 117–309; *Official Bulletin of the I.L.O.*, vol. 37, No. 4 (1954); vol. 38, No. 1 (1955).

[6] See *Official Records of the World Health Organization*, Nos. 42, 48 and 56.

[7] These opinions are embodied in the annotated edition of the conventions, regulations, and agreements of the Universal Postal Union published from time to time by the International Bureau of the Union under the title, *Les Actes de l'Union Postale Universelle Annotées par les soins du Bureau international.*

to the General Agreement on Tariffs and Trade on applications made to them for exemption from and waivers of the provisions of the Agreement constitute a substantial body of precedent on questions of commercial policy.[1] The European Convention on Human Rights provides for a European Commission of Human Rights the reports of which may in course of time constitute an important body of case law relating to civil liberties. In the absence from such publications as the *Annual Digest and Reports of Public International Law Cases* and the United Nations *Reports of International Arbitral Awards* of any reference to such opinions and decisions they tend to be disregarded, much as analogous national decisions tend to be disregarded if one confines one's reading to the *Law Reports*. Taken individually, none of these developments may be of major significance for the future of international law and no one would suggest that general expositions of the law should contain a detailed account of the decisions and opinions given by such procedures, but their growing importance should not be disregarded; cumulatively, their impact is considerable and an analysis of the sources of the law which disregards them is already as incomplete as Dicey's analysis of the rule of law[2] has proved to be in an age of delegated legislation and decision by administrative tribunals[3] and may shortly, if the present rate of development is maintained, become seriously misleading. Just as Maine[4] and Vinogradoff[5] enriched the law by drawing on the beginnings of anthropological and sociological research, and Maitland[6] by absorbing into its sources a wide range of previously disregarded medieval records, as Brandeis introduced a new realism into the discussion of constitutional issues in the United States by the device of the economic brief,[7] as Thring,[8] Ilbert,[9] and Freund[10] gave the science and craft of legislation a new status in the law, and as Robson,[11] C. K. Allen,[12] and Landis[13] have enlarged the frontiers of the common lawyer to include administrative processes, so the contemporary international lawyer must broaden his horizons to include among his sources a wide range of intractable documentation relating to the activities and decisions of international organizations, and, among his preoccupations, the impact of these activities and decisions on the substance of the law, especially in the economic and technological field. The international lawyer neither can, nor should he attempt to, become as such an expert in currency, trade union law, quarantine or commercial policy, and the details of these matters have no place in a general exposition of international law, but the manner in which the international law on these subjects is being developed is something which he must take into account in his analysis of the law-making processes of the international community. These regulative and quasi-judicial powers present, like the administrative processes of municipal law, a complex of dangers and constructive opportunities which must be balanced against each other in the light of contemporary needs.

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[1] General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents*, vol. ii, *Decisions, Declarations, Resolutions, Rulings and Reports*, 1952, and *First, Second and Third Supplements*, 1953, 1954 and 1955.

[2] *Law of the Constitution*, 8th ed. (1915), pp. 179–409.

[3] Cf. Allen, *Law and Orders* (1945).

[4] E.g., *Ancient Law, Early History of Institutions, Village Communities in the East and West, Early Law and Custom.*

[5] *Outlines of Historical Jurisprudence* (1920–2).

[6] E.g., *History of English Law*, 2nd ed. (1911), and especially *Domesday Book and Beyond, Township and Borough*, and *Memoranda de Parliamento.*

[7] Mason, *Brandeis—A Free Man's Life* (1946), pp. 245–53.

[8] *Practical Legislation*, 2nd ed. (1902).

[9] *Legislative Methods and Forms* (1901); *The Mechanics of Law Making* (1914).

[10] *Legislative Regulation* (1932).

[11] *Justice and Administrative Law* (1928).

[12] *Bureaucracy Triumphant* (1931); *Law and Orders* (1945).

[13] *The Administrative Process* (1938).

The role of judicial and arbitral decision in the contemporary development of international law has, particularly in the common law countries, been more fully explored,[1] partly no doubt because the *Reports of Judgments, Advisory Opinions and Orders*, of the Permanent Court of International Justice and the International Court of Justice, the *Annual Digest and Reports of Public International Law Cases* and the United Nations *Reports of International Arbitral Awards* have made the materials for such study readily available, primarily because the process of judicial and arbitral decision is instinctively regarded by the common lawyer as the most important factor in the development of the law. This is not necessarily true in a phase of legal development when the boundaries of the law are being extended to include wholly new territory which must be claimed and mapped out in the first instance by legislative action, but while it is important for this reason to avoid exaggerating the part which judicial and arbitral decision can play in the foreseeable future they have none the less during the last generation transformed the character of the law within its accepted frontiers by substituting reasonably authoritative precedent for inchoate and debatable custom. Wheaton and Phillimore, Westlake and Hall were hardly ever in the position of being able to cite an international decision or award as authority for their views, and had little access to the judicial decisions of other countries; the contemporary international lawyer not only can, but increasingly does, rely systematically on such sources.

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[1] McNair, *The Development of International Justice* (1954); Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), *The Function of Law in the International Community* (1933), *The Development of International Law by the Permanent Court of International Justice* (1934); Ralston, *The Law and Procedure of International Tribunals* (1926), *Supplement* thereto (1936); Beckett, 'Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application', in this *Year Book*, 11 (1930), pp. 1–54, 'Les Questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de Justice internationale', in *Recueil des Cours*, 39 (1932) (i), pp. 135–69, and ibid. 50 (1934) (iv), pp. 193–205; Fitzmaurice, 'The Law and Procedure of the International Court of Jusitce', in this *Year Book*, 27 (1950), pp. 1–41, 28 (1951), pp. 1–28, 29 (1952), pp. 1–62, 30 (1953), pp. 1–70; Bastid, 'La jurisprudence de la Cour internationale de Justice', in *Recueil des Cours*, 78 (1951) (i), pp. 579–686; Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed. (1949); Hambro, *The Case Law of the International Court* (1952); Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953).

Among the law-making processes of the international community the prospects for the codification of international law call for continuing attention.[1] It is primarily in respect of the law governing the relations between States, the law of treaties, and the law of arbitration and judicial settlement, which are based so largely on custom, rather than of the newer branches of international law which have been developed chiefly on the basis of law-making treaties, that the codification of international law as such may have a significant part to play, and the main emphasis of codification in the sense of re-stating and developing the existing law, as distinguished from new legislative enactment, has properly been in these fields. An analogous process of consolidation, systematization, and in some cases clarification of treaty provisions is necessary in the newer fields but calls for different instruments and methods of work and must be mainly the responsibility of the appropriate specialized bodies. The difficulties which have been encountered in connexion with the authority of customary law have an important bearing on the prospects for codification; an effort on an altogether new scale is required to secure substantial results, and important changes of method may be necessary. An assessment of the progress and prospects of codification is, however, a necessary part of the analysis of the law-making processes of the international community.

The relation between international and municipal law

The relation between international and municipal law is partly a problem of jurisprudence, partly a problem of international law which is frequently of practical importance in diplomatic discussions and international arbitration, partly a problem of the municipal law of the country where a particular question arises. As a problem of jurisprudence the question has frequently dominated the general theory of international law as expounded by speculative writers[2] to the extent of determining the general character of the legal systems of particular thinkers as monist or dualist. Some account of these controversies is a necessary part of the philosophical and historical background to the present law, but it is believed that the instinct of the common lawyers in treating them as of relatively secondary importance[1] has been a sound one. No speculative system concerning the philosophical and logical foundations of international law and its relationship to municipal law has commanded general or continued acceptance.[2] Such systems play, however, the same part as speculative jurisprudence plays in all branches of law; they furnish a body of general ideas which constitute the cultural background of the development of the law; in this manner they may exercise a fertilizing or a petrifying influence and affect profoundly, for good or for ill, the general course of legal development. The empirical approach of the common lawyers, while fundamentally valid, must therefore be qualified by a willingness to allow jurisprudential speculation to enrich the law without weakening the roots in experience and capacity for natural processes of growth which constitute its strength.

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[1] Cf. Hurst, 'Plea for the Codification of International Law on New Lines', in *Transactions of the Grotius Society*, 32 (1946), pp. 135–53; McNair, *The Development and Formulation of International Law*, in International Law Association, *Report of the Forty-Second Conference, Prague, 1947*, pp. 64–66 and 82–111; Jennings 'The Progressive Development of International Law and its Codification', in this *Year Book*, 24 (1947), pp. 301–29; Lauterpacht, 'Codification and Development of International Law', in *American Journal of International Law*, 49 (1955), pp. 16–43; cf. also the following earlier discussions which are still illuminating: Baker, 'The Codification of International Law', in this *Year Book*, 5 (1924), pp. 38–65; Brierly, 'The Future of Codification', ibid. 12 (1931), pp. 1–12.

[2] E.g., Triepel, 'Les rapports entre le droit international et le droit interne', in *Recueil des Cours*, 1 (1923), pp. 77–121; Anzilotti, *Cours de droit international*, French translation by Gidel, vol. i (1929), pp. 49–65; Kelsen, 'Les rapports de système entre le droit interne et le droit international public', in *Recueil des Cours*, 14 (1926), pp. 231–331; the same, *General Theory of Law and the State* (1945), pp. 328–88.

The primacy of international law in all proceedings before international bodies now rests on a solid basis of judicial, arbitral and diplomatic precedent[3] the exposition of which presents no special difficulty and calls for no special comment here.

Though the status of international law in the municipal law of any particular country is primarily a matter of municipal rather than of international law,[4] some treatment of the subject is necessary to the understanding of the scope, effectiveness and *modus operandi* of international law, and it is therefore rightly included in the exposition of international law as such; it is most desirable that this question should be treated comparatively on the basis of the existing positive law of a substantial number of States and not doctrinally or on a positive basis restricted to the law of one State or a number of States with similar legal systems.[1] Some consideration of the extent to which existing national law or practice affords a solid sub-structure for the further development of international law and organization or calls for modification with a view to securing a fuller integration of the legal structure of the international community is also desirable in this connexion,[2] and the long-range implications of the merger of the substantive content of international and national law which is taking place in such fields as human rights, property rights of a distinctly international character, and common rules and standards, remain to be fully explored. This question has been considered hitherto primarily in connexion with the controversy between monist and dualist theories and for this reason has been discussed on a somewhat abstract basis. It would also seem desirable to examine it from another angle. In such fields as aviation, safety of life at sea, postal relations, quarantine regulations and telecommunications, however, the international and national rules have in many cases become indistinguishable for practical purposes to the extent of national services being operated on the basis of international manuals of regulations. This goes substantially beyond treating prize law or the law of maritime jurisdiction or the law relating to diplomatic immunities as a part of the law of the land; it involves the international and national regulation of matters governed by detailed technical rules and standards being for practical purposes merged in a system which is wider than municipal law. In such cases we are confronted with a practical consolidation of the detailed content of the international and national legal systems which represents a new factor of major importance in the relationship between international and municipal law.

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[1] Cf. McNair in *Transactions of the Grotius Society*, 30 (1944), at p. 11; Fischer Williams, *Aspects of Modern International Law* (1939), pp. 75–82.

[2] Brierly, 'Le Fondement du caractère obligatoire du droit international', in *Recueil des Cours*, 23 (1928) (iii), pp. 467–549; Glanville Williams, 'International Law and the Controversy concerning the Word "Law" ', in this *Year Book*, 22 (1945), pp. 146–63; *Modern Theories of Law*, ed. Jennings (1933).

[3] E.g., Moore, *Digest of International Law* (1906), vol. i, pp. 4–7; Hackworth, *Digest of International Law* (1940), vol. i, pp. 24–35; Morgenstern, 'Judicial Practice and the Supremacy of International Law', in this *Year Book*, 27 (1950), pp. 42–48.

[4] Picciotto, *The Relation of International Law to the Law of England and the United States* (1915); Dickinson, 'Changing Concepts and the Doctrine of Incorporation', in *American Journal of International Law*, 26 (1932), pp. 239–260; Lauterpacht, 'Is International Law Part of the Law of England?', in *Transactions of the Grotius Society*, 25 (1939), pp. 51–88; McNair, 'The Method whereby International Law is made to Prevail in Municipal Courts on an Issue of International Law', in *Transactions of the Grotius Society*, 30 (1944), pp. 11–49; Jenks, 'The Authority in English Courts of Decisions of the Permanent Court of International Justice', in this *Year Book*, 20 (1939), pp. 1–36; Morgenstern, 'Judicial Practice and the Supremacy of International Law', ibid. 27 (1950), pp. 48–92.

The law governing the relations between States

States continue, and will long if not always continue, to be the basic units of organization of the international community, and the law governing the relations between States, while no longer representing the whole of international law, therefore continues, and must continue, to be a leading division of the law. In view of its nature and importance this division of the law is most appropriately dealt with for purposes of analysis and exposition immediately after the law governing the structure and law-making processes of the international community and prior to the examination of the newer developments. The law governing the relations between States includes both the traditional core of the law which has been so widely criticized as unduly formal in character and a new body of law governing the economic relations of States as such.

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[1] The *United Nations Legislative Series* includes a most useful volume of *Laws and Practices concerning the Conclusion of Treaties* covering eighty-six different countries; an equally comprehensive survey of the status of customary international law in national law, though doubtless more difficult to prepare, would also be of great value.

[2] Mirkine-Guetzévitch, *Les Nouvelles tendances du droit constitutionnel* (1931); the same, 'Droit international et droit constitutionnel', in *Recueil des Cours*, 38 (1938) (iv), pp. 311–463; Jenks, 'The Proposed Peace Act', in *Transactions of the Grotius Society*, 21 (1935), pp. 1–21; Paul de Visscher, 'Les Tendances internationales des constitutions modernes', in *Recueil des Cours*, 80 (1952) (i), pp. 511–77.

(*a*) *The traditional core*

Even in respect of the traditional core of the law, there have been far-reaching changes in recent years, and the law is at present in a particularly fluid stage of development. The changes have resulted in part from the impact of international law on international organization,[1] in part from the influence of new and newly influential members of the international community on the development of the law and the modification of existing law, in part from the need to adapt the law to changed economic, social, and technological conditions, in part from the emergence of new problems with which international law is being called upon to concern itself for the first time. The most fundamental of these changes is that in the legal status of war and neutrality resulting from the General Treaty for the Renunciation of War, the Charter of the United Nations and other instruments,[2] but few of the traditional topics of international law have escaped the influence of far-reaching change. The law of State immunities, for instance, has been extensively reconsidered, primarily as the result of the extension of the economic activities of the State.[3] The status of armed forces stationed in friendly territory in time of peace has assumed an altogether new importance.[4] The question of foreign effects of nationalization of property has continued to present new aspects.[5] The emergence of the problem of the continental shelf and of sovereignty over submarine areas generally as the result of it having become practicable to exploit economically oil and other resources from the bed of the sea[6] has involved some qualification of the earlier law concerning the freedom of the seas. The decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case[1] has raised important questions concerning the delimitation of coastal waters. The prospect that it may be possible to exploit natural resources in the Antarctic and the opening up of 'great circle' air routes in the northern hemisphere have given a new importance to the question of sovereignty over polar areas.[2] The development of atomic energy confronts international law with new problems.[3] The projection of human activity into inter-planetary space may shortly confront international law with altogether unprecedented problems comparable in importance to those of the freedom of the seas and the sovereignty of the air. Although the law of war, much of which is applicable to international collective action in restraint of an illegal use of aggression,[4] has been extensively revised by the Geneva Conventions of 1949,[5] atomic energy, aerial bombardment and guided missiles all present problems calling for further consideration.[6]

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[1] Jenks, 'The Impact of International Organisations on the Development of Public and Private International Law', in *Transactions of the Grotius Society*, 37 (1951), pp. 23–60.

[2] Cf. Oppenheim, *International Law*, 6th ed. by Lauterpacht (1944), vol. ii, pp. 144–62 and 501–6; Lauterpacht, 'The Limits of the Operation of the Law of War', in this *Year Book*, 30 (1953), pp. 206–43; Quincy Wright, 'The Outlawry of War and the Law of War', in *American Journal of International Law*, 47 (1953), pp. 365–76; Lalive, 'International Organization and Neutrality', in this *Year Book*, 24 (1947), pp. 72–89.

[3] Cf. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', ibid. 28 (1951), pp. 220–72; Fawcett, 'Legal Aspects of State Trading', ibid. 25 (1948), pp. 34–51; Hamson, 'Immunity of Foreign States: The Practice of the French Courts', ibid. 27 (1950), pp. 293–331.

[4] Cf. Barton, 'Foreign Armed Forces: Immunity from Supervisory Jurisdiction', ibid. 26 (1949), pp. 380–413, and 'Foreign Armed Forces: Immunity from Criminal Jurisdiction', ibid. 27 (1950), pp. 186–234.

[5] Cf. *Annuaire de l'Institut de droit international*, vol. 43 (i) (1950), pp. 42–132, vol. 44 (ii) (1952), pp. 251–323; Fawcett, 'Some Foreign Effects of Nationalization of Property', in this *Year Book*, 27 (1950), pp. 355–75.

[6] Cf. Vallat, 'The Continental Shelf', ibid. 23 (1946), pp. 233–338; Hurst, 'The Continental

Superficially, this widespread ferment may create an impression of general uncertainty which will confirm the scepticism of the critics of international law, but it corresponds to the periods of uncertainty through which every system of law necessarily passes during phases of rapid development.[7] As Fischer Williams so aptly said, 'It is true that much of international law has still to be developed, and that we are only at the beginning. This, however, ought not to be made a reproach to international

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Shelf', in *Transactions of the Grotius Society*, 34 (1948), pp. 153–69; Waldock, 'The Legal Basis of Claims to the Continental Shelf', ibid. 36 (1950), pp. 115–48; Lauterpacht, 'Sovereignty over Submarine Areas', in this *Year Book*, 27 (1950), pp. 376–433; Young, 'Present Developments with respect to the Continental Shelf', in *American Journal of International Law*, 42 (1948), pp. 848–55, and 'The Legal Status of Submarine Areas beneath the High Seas', ibid. 45 (1951), pp. 225–39; *Report of the International Law Commission covering the Work of its Fifth Session, 1 June–14 August 1953*, United Nations Document, General Assembly Official Records, Eighth Session, Supplement No. 9 (A/2456). See also Hurst, 'Whose is the Bed of the Sea?', in this *Year Book*, 4 (1923–4), pp. 34–43.

[1] *I.C.J. Reports*, 1951, pp. 116–209; and see Waldock, 'The Anglo-Norwegian Fisheries Case', in this *Year Book*, 28 (1951), pp. 114–71.

[2] Cf. Smedal, *Acquisition of Sovereignty over Polar Areas* (1931); and see Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies', in this *Year Book*, 25 (1948), pp. 311–53; Dollot, 'Le Droit international des espaces polaires', in *Recueil des Cours*, 75 (1949) (ii), pp. 121–95; Hunter Christie, *The Antarctic Problem* (1951).

[3] Cf. Bathurst, 'Legal Aspects of the International Control of Atomic Energy', in this *Year Book*, 24 (1947), pp. 1–32.

[4] Cf. Lauterpacht, 'The Limits of the Operation of the Law of War', ibid. 30 (1953), pp. 206–43; see also *Proceedings of the American Society of International Law*, 1952, pp. 216–220, and 1953, pp. 90–121.

[5] Cf. Joyce Gutteridge, 'The Geneva Conventions of 1949', in this *Year Book*, 26 (1949), pp. 294–336.

[6] Cf. Kunz, 'The Chaotic State of the Laws of War', in *American Journal of International Law*, 45 (1951), pp. 37–61; Lauterpacht, 'The Problem of the Revision of the Law of War', in this *Year Book*, 29 (1950), pp. 360–82.

[7] Cf. Fifoot, *Lord Mansfield* (1936), especially pp. 198–229; Pound, *Interpretations of Legal History* (1946); Cardozo, *The Growth of the Law* (1924); Wright, 'The Common Law in its Old Home', in *Legal Essays and Addresses* (1939), pp. 327–86; Denning, *The Changing Law* (1953).

law, and least of all by English or American lawyers who have seen their own system develop slowly, adapting itself to facts as they change, and always with a certain fringe of unsettled points arising with each new set of practical problems.'[1] On a closer view, despite the apparent set-backs which sometimes occur when new or newly influential members of the international community challenge what was assumed to be a generally accepted rule, when more detailed analysis shows problems to be more complex than had been supposed, or when relatively amorphous custom is put to the test of judicial decision, there is a reasonably consistent general trend towards enlarging the scope of the law, defining its rules with greater precision, and eliminating traditional survivals which have ceased to correspond to present-day conditions or needs. The traditional core of international law—the law relating to territory, jurisdiction, immunities, and similar aspects of the relationships of States as such—is being progressively modified to bring it into closer correspondence with contemporary needs and is thereby assuming its place within the wider concept of a common law of mankind.

There is sometimes a close relationship between the rules concerning matters such as territory and jurisdiction which govern directly the relations of States and rules applicable to individuals which complement the rules governing the relations of States. The freedom of the seas, for instance, would afford no effective guarantee of the safety of navigation and commerce in the absence of the International Code of Signals, the International Collision Regulations, the Safety of Life at Sea Convention, and the Brussels Conventions on Collisions and Salvage which in practice govern the operation of ships.[2] It is by means of these instruments that the development of international law has made the high seas a safe highway for the world. Similarly, the freedom of the seas would be incompatible with the proper conservation of marine resources in the absence of international fisheries and whaling conventions and regulations which apply directly to individuals;[3] in these circumstances, such instruments should no longer be regarded, as they were quite naturally, and indeed properly, regarded in the early stages of their development, as conventional exceptions to the general law, but rather as a conventional counterpart in the absence of which the customary law derived from the general principle of the freedom of the seas would produce chaos. The difference may be one of emphasis, but it is none the less important and it involves a considerable recasting of the traditional exposition of the subject. As another illustration may be mentioned the case of international canals in which the principle of freedom of access on equal terms for the vessels of all nations laid down by treaties concluded by the States primarily concerned would be ineffective in the absence of navigation rules for the security of navigation and tonnage measurement rules on the basis of which canal dues are assessed. There is no uniformity in the precise legal nature of these rules. The Suez Canal Rules of Navigation[1] are regulations made by the Suez Canal Company in virtue of the authority conferred upon it by the Act of Concession granted by the Egyptian Government; the Suez Canal Measurement Rules[2] were recommended by an International Tonnage Commission of representatives of twelve maritime powers which met at Constantinople in 1873 and made mandatory upon the Suez Canal Company by a decree of the Sultan of Turkey; the Rules and Regulations for the Navigation of the Panama Canal and the Panama Canal Measurement Rules are based on statutes and executive orders of the United States.[3] To disregard such rules and regulations on the ground that they have not the formal status of law between States and are subject to unilateral modification is, however, to give a quite artificial picture of the legal régime of international canals as it operates in practice. In this and analogous cases, the most appropriate manner in which to expound the present state of the law would appear to be to describe in the usual manner the applicable treaty provisions such as the Convention of Constantinople and the Hay-Pauncefote and Hay-Varilla Treaties, to indicate where the competence to regulate the use of the canals is lodged and how it is exercised, and to give some brief account of the principles underlying the rules and regulations which, irrespective of their precise technical status, constitute for mariners, shipowners and traders throughout the world the working law of international canals in time of peace. These illustrations are indications of the extent to which, in certain fields, the satisfactory operation of the law governing the relations between States is dependent on the parallel operation of instruments prescribing uniform international rules for the conduct of individuals; they also emphasize the inter-dependence of the main divisions into which we have found it convenient to classify contemporary international law.

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[1] *Chapters on Current International Law and the League of Nations* (1929), p. 339.

[2] Colombos, *The International Law of the Sea*, 3rd ed. (1954), pp. 252–87.

[3] Colombos, op. cit., pp. 304–21; Jessup, 'L'Exploration des richesses de la mer', in *Recueil des Cours*, 29 (1929) (iv), pp. 405–511; Tomaševitch, *International Agreements on Conservation of Marine Resources* (1943); Leonard, *International Regulation of Fisheries* (1944); International Law Commission, *Report on Fifth Session*, 1953, United Nations Document, General Assembly Official Records, Eighth Session, Supplement No. 9 (A/2456).

+ (*b*) *The law governing economic relations between States*

The growth of an increasingly interdependent world economy has been reflected in the development of a new body of law governing the economic relations between States which is based mainly on the provisions of law-making treaties. As the result of the Articles of Agreement of the International Monetary Fund, which are now in force for the fifty-six member States of the Fund, changes in exchange rates are no longer a purely national matter; each member of the Fund has an obligation to maintain orderly exchange arrangements on the basis of par values agreed with the Fund, to refrain from discriminatory currency arrangements and multiple currency practices and to achieve and maintain a multilateral system of payments in respect of current transactions; certain obligations of consultation must be fulfilled before rates are changed, and if changes are made without the concurrence of the Fund the member may incur certain disabilities;[1] while the Fund is not given final authority over national policies concerning currency depreciation or appreciation, these policies no longer result from unilateral decisions which no international authority is formally entitled to appraise or to take recognized measures to counteract; they have been brought within the ambit of the law. In like manner, for the thirty-five contracting parties to the General Agreement on Tariffs and Trade, changes in commercial policy and tariff schedules are no longer a purely national matter; they are bound by an international agreement which embodies obligations of consultation and constitutes a general code governing the commercial relations of States.[2] Even the law governing the relations between States in the strictest sense is increasingly acquiring an important economic content.

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[1] Wilson, *The Suez Canal*, 2nd ed. (1939), pp. 193–205.

[2] Ibid., pp. 205–10.

[3] Padelford, *The Panama Canal* (1942), pp. 92–117.

While the new body of law governing the economic relations of States as such is based mainly on the provisions of law-making treaties, there is also scope for some development of this division of the law by other means. The equitable solution of conflicts of State interests arising out of diversions of water and other artificial interferences with the natural course of streams for such purposes as navigation, irrigation and the development of hydro-electric power affords a significant illustration of a problem in respect of which, although the law may be inchoate and regulation based on agreement the only fully satisfactory method of adjusting conflicting interests, there is considerable scope for the formulation of guiding principles by means of custom and judicial and arbitral decision.[3] The *Trail Smelter Arbitration*[4] is an interesting indication of the way in which the international law of air and water pollution may be developed in the same manner. The industrial utilization of atomic energy may present similar problems in the event of action or negligence on the territory of one State producing loss or damage on the territory of another. One can conceive of a situation in which economic loss to one State resulting from action taken by another State unreasonably or in violation of its international obligations relating to monetary or economic policy might be regarded as giving rise to a claim for compensation. These, however, are speculations which outrun the present stage of development of the law.

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[1] Nussbaum, *Money in the Law—National and International*, 2nd ed. (1950), pp. 525–46; Mann, *The Legal Aspect of Money*, 2nd ed. (1953), pp. 428–34.

[2] Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (1951).

[3] Cf. Smith, *The Economic Uses of International Rivers* (1931), especially pp. 150–8; Sauser-Hall, 'L'Utilisation industrielle des fleuves internationaux', in *Recueil des Cours*, 83 (1953).

[4] *United Nations, Reports of International Arbitral Awards*, 1949, pp. 1905–82.

Financial transactions among States are another subject the law concerning which is in an early stage of development. The monetary law of inter-State obligations is largely unexplored,[1] while the limits, if any, of international financial contracts, the legal machinery of international payments, and the desirability of an international procedure analogous to bankruptcy proceedings—subjects which attracted considerable attention in connexion with the international indebtedness of the inter-war period[2]—call for fuller consideration. The law on these subjects, while governing the relations of States as such, is not in any sense a law defining or delimiting their jurisdiction but a law governing the substance of their economic and financial relations.

International guarantees of human rights

One of the healthiest reactions to modern totalitarianism and the events of the Second World War has been a renewed emphasis on the fact that men are the 'ultimate members' of the society of States and on the part which can and should be played by international law and organization in the protection of human rights and fundamental freedoms.[3] Such a concept is not in any way new to international law. It was perhaps the most characteristic feature of the work of Vittoria and during the intervening centuries it has never been lost from view.[4] Even writers who have denied individuals any status in international law have dealt in detail with rules of international law designed for their protection. Oppenheim, for instance, without conceding like Westlake that men are the ultimate subjects of the law, states very clearly that 'the individual is often the object of international regulation and protection, and this statement has been elaborated by his Editor into the proposition that "individuals are the ultimate objects of international law, as they are, indeed, of all law" '.[5]

Historically, the preoccupation of international law with human rights has developed in four main contexts: (*a*) international action for the suppression of slavery and the slave trade, from the Congress of Vienna to current proposals for the revision of the 1926 International Slavery Convention;[1] (*b*) other international measures for the protection of backward peoples, notably the Berlin and Brussels Acts of 1885 and 1890, and the mandates and trusteeship agreements;[2] (*c*) international arrangements for the protection of minorities, including those relating to the Balkans agreed upon at the Berlin Congress of 1878 and culminating in the minorities treaties and declarations administered by the League of Nations which embodied undertakings to assure the full and complete protection of life and liberty without distinction of birth, nationality, language, race or religion, and included provision for the free exercise of religion, rights of nationality and emigration, equality before the law, educational facilities for minorities, and similar matters;[3] and (*d*) the development in the law of State responsibility of the concept of an international standard for the treatment of aliens, applicable to such matters as unlawful arrest, detention, harsh treatment during imprisonment, refusal of access to court or its equivalent, unreasonable delay in administering justice, irregularities in the conduct of proceedings, and contractual and property claims.[4] With the formulation of the Universal Declaration of Human Rights as an expression of the legal conscience of mankind,[5] the discussion of proposed covenants of human rights designed to embody obligations binding upon States, the entry into force of a European Convention for the Protection of Human Rights and Fundamental Freedoms,[6] and the inclusion of guarantees for the protection of human rights in a substantial number of other international instruments including a number of international labour conventions,[7] matters have now reached the stage of development at which international guarantees of human rights must be regarded as one of the main substantive divisions of international law. The scope of this division of the law is wide. It includes all aspects of civil rights, important political, economic and social rights, and a number of collective rights such as freedom of association, in addition to rights of a purely individual character. In some cases the law in its present stage of development does no more than declare a right in principle; in others it embodies definite obligations upon States to acknowledge, respect and maintain certain rights; in certain cases international procedures of redress or inquiry have been introduced. In relation to States which are bound by international obligations of a general character regarding human rights, matters such as the right to life, liberty, and security of the person, freedom from arbitrary arrest and detention, the right to a fair trial and to benefit from the presumption of innocence, freedom of thought, conscience, religion, and expression, freedom of peaceful assembly and of association, the right to effective means of redress against public authorities, and the right to equal protection of the law have become substantive requirements of international as well as constitutional law. They are no longer incidents of a special régime of minority protection or criteria for determining whether there has been a denial of justice to an alien but general rules of law applicable to nationals as well as to aliens and minorities. This is already the position in respect of the parties to the European Conventions for the Protection of Human Rights and Fundamental Freedoms, and the entry into force of a satisfactory International Covenant on Civil and Political Rights would establish the same position on a broader geographical basis. A legal system in which such rights increasingly hold a central place has evolved far in the direction of a common law of mankind. It is no longer a law between States only and exclusively but a law which embodies guarantees of individual rights which are simultaneously national and international in character and are enforceable by both national and international procedures. The economic and social rights proclaimed in the Universal Declaration of Human Rights and formulated for acceptance by governments as obligations in the proposed International Covenant on Social and Economic Rights, like those proclaimed in national constitutions,[1] are by their very nature of a different legal character and are not susceptible of enforcement by legal proceedings at the instance of an interested party until implemented by specific legislation; in the case of many of these rights, however, including the right to just and favourable conditions of work, the right to rest and leisure, the right to equal pay for equal work, the right to protection against unemployment, the right to social security, and the right to form and join trade unions, the necessary specific legislation already exists, internationally and nationally, in the form of the relevant international labour conventions,[2] some of which have been widely ratified, and the national legislation implementing these conventions; the process of giving them a specific content in this manner is, of course, a continuing one. The common law of mankind towards which the international legal system has already evolved so far is increasingly a law with a developed social content.

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[1] Mann, op. cit., pp. 445–63.

[2] See, for instance, Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), pp. 257–419; see also Borchard, *State Insolvency and Foreign Bondholders* (1951).

[3] Lauterpacht, *International Law and Human Rights* (1950).

[4] Cowles, 'The Impact of International Law on the Individual', in *Proceedings of the American Society of International Law*, 1952, pp. 71–85.

[5] *International Law*, 8th ed. by Lauterpacht (1955), vol. i, p. 636; see also Manner, 'The Object Theory of the Individual in International Law', in *American Journal of International Law*, 46 (1952), pp. 428–49.

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[1] Cf. Wheaton, *History of the Law of Nations* (1845), pp. 497–98 and 585–737; Vitta, 'La Défense internationale de la liberté et de la moralité individuelles', in *Recueil des Cours*, 45 (1933) (iii), pp. 561–617; United Nations Publication No. 1951, xiv. 2, *The Suppression of Slavery*.

[2] Cf. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926); Bentwich, *The Mandates System* (1930); Quincy Wright, *Mandates under the League of Nations* (1930); Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948).

[3] Cf. Stone, *International Guarantees of Minority Rights* (1932); *Regional Guarantees of Minority Rights* (1933); Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942); Ito, *La Protection des minorités* (1931); Mandelstam, *La Protection internationale des minorités* (1931).

[4] Cf. Freeman, *The International Responsibility of States for Denial of Justice* (1938); Borchard, *The Diplomatic Protection of Citizens Abroad* (1915); Nielsen, *International Law Applied to Reclamations* (1933); Feller, *The Mexican Claims Commissions* (1935).

[5] Cf. Lauterpacht, 'The Universal Declaration of Human Rights', in this *Year Book*, 25 (1948), pp. 354–81.

[6] Cf. Robertson, 'The European Convention for the Protection of Human Rights', in this *Year Book*, 27 (1950), pp. 145–63; also in 28 (1951), pp. 359–65, and 29 (1952), pp. 452–4.

[7] Cf. Jenks, 'The Protection of Freedom of Association by the International Labour Organization', ibid. 28 (1951), pp. 348–59; see also Jenks in *Recueil des Cours*, 1955.

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[1] International Labour Office, *Constitutional Provisions concerning Social and Economic Policy*, 1944.

[2] See *The International Labour Code*, 1951, 2 vols. (1952).

Property rights of a distinctively international character

There are certain property rights of a distinctively international character which are probably most conveniently discussed as a separate division of the law, though the matter must be regarded as debatable and to some extent a question of convenience and opinion. The characteristic of such rights is that, unlike rights in respect of immovables which are governed wholly by the *lex situs*[1] or rights acquired under one legal system which are recognized under other legal systems by virtue of the principles of private international law[2] or are protected internationally by the diplomatic protection extended by States to their nationals,[3] these rights are most appropriately regarded as being distinctively international in origin and character.

As an illustration we may take the rights provided for in the union conventions on copyright, patents and trade marks, which specifically provide that the participating countries constitute a union for the protection of each of these rights. The classification of these rights, which have long constituted an imposing body of law,[4] has tended to be a matter of somewhat arbitrary personal taste. Hall solved the problem by ignoring them.[5] Brierly refers briefly to the Copyright Union as an example of the older type of public international union.[6] Lauterpacht's Oppenheim, in the 5th to the 7th editions, mentioned them in an appendix listing the more important general conventions, and in the 8th edition refers to both copyright and patents in a footnote to the account given in the appendix on U.N.E.S.C.O.[7] Hyde deals with the matter as a subdivision of the exercise by a State of certain rights as sovereign within its own domain.[8] Fauchille discusses the subject in a chapter describing different types of treaties.[9]

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[1] Cheshire, *Private International Law*, 2nd ed. (1938), pp. 409–14.

[2] Ibid., pp. 4–6.

[3] Borchard, op. cit.

[4] Ladas, *The International Protection of Industrial Property* (1930); the same, *The International Protection of Literary and Artistic Property* (1938); Bodenhausen, 'Problèmes actuels du droit international de la propriété industrielle, litteraire et artistique', in *Recueil des Cours*, 74 (1949) (i), pp. 383–463.

[5] Schwarzenberger, *Manual of International Law* (1947), and Starke, *Introduction to International Law*, 3rd ed. (1954), may also be mentioned as general textbooks which omit the subject entirely.

[6] *Law of Nations*, 4th ed. (1949), p. 95.

[7] *International Law*, 8th ed. (1955), vol. i, pp. 992–3.

[8] *International Law Chiefly as Interpreted and Applied by the United States*, 2nd revised ed. (1945), pp. 680–6.

[9] *Traité de droit international public*, vol. i, Part 3 (1926), pp. 455–60.

Bustamante deals with it as one of the subdivisions of international administrative law.[1] These variations reflect the absence of any accepted view of the relationship of the union conventions on these subjects to the general body of international law. The rights provided for in these conventions have, however, an international character which distinguishes them from rights vested under the law of one country which are recognized in other countries by application of the principles of private international law or protected internationally by the diplomatic protection of citizens. The rights internationally recognized by virtue of these conventions are derived partly from the law and practice of the country where the right was first claimed, partly from the application of the principle of national treatment in the country where the question arises, and partly from specific provisions of the conventions. In these circumstances, they are most conveniently construed as distinctively international rights based primarily on the conventions, though governed in certain respects by the municipal law applying these conventions. They are, therefore, it is submitted, most appropriately regarded as constituting a separate division of the law intermediate between human rights protected by international guarantees and common rules established by international instruments; they differ from the first in that they protect rights of property rather than human rights and from the second in that they provide for the protection of individual and, in general, transferable rights of property rather than for the observance of common rules and standards.

The same general division of the law would also include any similar international protection which may be developed in respect of scientific property (a topic which has been the subject of considerable discussion[2] but which the Interim Copyright Committee established by the Universal Copyright Convention has regarded as being outside the field of copyright as it stands at present)[3] or in respect of the rights of performers, record manufacturers and broadcasting organizations.[4]

It is a matter for consideration whether certain other rights to draw money which are derived from international instruments or protected by international guarantees, such as migrants' pension rights,[5] are not most logically and conveniently dealt with under the same general heading; in some cases the existence of such rights, and not merely their international validity, is derived from an international instrument, in that the conditions of entitlement are only satisfied if account is taken of periods of time governed by different laws and regulations.

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[1] *Derecho Internacional Público* (1934), vol. ii, pp. 131–215.

[2] *Unesco Copyright Bulletin*, vol. 6, No. 2 (1952).

[3] Ibid., vol. 7, No. 2 (1954), pp. 51–53.

[4] As regards which see International Labour Organization, Advisory Committee on Salaried Employees, Second Session, Geneva, 1952, Report III, *Rights of Performers in Broadcasting, Television and the Mechanical Reproduction of Sound.*

[5] Cf. Jenks, 'The Maintenance of Migrants' Pension Rights Convention, 1935', in *Political Science Quarterly*, 51 (1936), pp. 215–29.

The possibility that some of the rights arising out of the loan and bond transactions of the International Bank for Reconstruction and Development and certain other international financial transactions should be classified in the same manner as property rights of a distinctively international character also calls for closer examination.

It is particularly difficult, at a time when there is an understandable reluctance to create new types of property right, to assess the probable future importance of such property rights of a distinctively international character and the whole matter calls for much fuller consideration, but in the case of such property rights, as in that of human rights, the law has long since evolved from a law between States only and exclusively into a law which creates for the benefit of individuals rights the international and national character of which is merged.

Common rules applicable in virtue of international instruments

Oppenheim distinguishes universal international law, particular international law (which is binding on two or a few States only), and general international law which he defines as being 'the body of such rules as are binding on a great many States, including the leading States'.[1] The distinction is a particularly useful one in connexion with the common rules applicable to numerous forms of international intercourse in virtue of law-making treaties. Few such treaties are universally applicable and a large proportion of them are subject to periodical revision and to the possibility of denunciation by the parties after an initial period of validity or at recurring intervals; partly for these reasons and partly because much of their subject-matter lies outside the traditional scope of the subject they have generally been regarded as extraneous to, or at best marginal to, international law as a legal system and frequently receive only passing mention in systematic expositions of the law. There are, however, large sectors of international economic, social and cultural relations which are almost wholly governed by the provisions of such instruments.[2] Aviation;[3] broadcasting; customs formalities; much of maritime law;[4] negotiable instruments (in respect of civil law countries);[1] postal matters;[2] rail[3] and road[4] transport; sanitary regulations;[5] telecommunications;[6] the régime of ports and inland waterways;[7] weights and measures—these are only illustrations of the expanding field in which a large and growing volume of international transactions are governed by law-making treaties or analogous forms of international regulation which also represent a major consolidation of national law and practice. In the field of labour and social security the Conventions and Recommendations adopted by the International Labour Conference, which we have already examined in their bearing on human rights, are also common standards which are an important factor in economic policy; they constitute a widespread network of international obligations in respect of countries which have ratified Conventions and have, as a body of standards, exercised an even wider influence on national law and policy.[8]

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[1] *International Law*, 8th ed. by Lauterpacht (1955), vol. i, p. 5.

[2] Cf. Hudson, *International Legislation*, 9 volumes (1919–45), especially the Introduction to vol. i.

[3] Lemoine, *Traité de droit aérien* (1947); Shawcross and Beaumont, *On Air Law*, 2nd ed. (1951); McNair, *Law of the Air*, 2nd ed. (1954); Pépin, 'Le Droit aérien', in *Recueil des Cours*, 71 (1947) (ii), pp. 481–547; Jennings, 'Some Aspects of the International Law of the Air', ibid. 75 (1949) (ii), pp. 513–88; Goedhius, 'Questions of Public International Air Law', ibid. 81 (1952) (ii), pp. 205–307.

[4] Colombos, *International Law of the Sea*, 3rd ed. (1954); Gidel, *Le Droit international public de la mer* (1932–4).

A conception of international law which excludes these matters from its scope[9] or regards them as of secondary importance has now become wholly artificial; a presentation of the law which treats them as special topics which do not require any radical modification of our general conception of the scope and content of international law or call for more than passing mention in a general treatment of the subject fails to do justice to either the intrinsic importance of these matters or the capacity which international law has in fact already shown to adapt itself to current needs. The difficulty of disentangling principle from detail in this new mass of law may be readily admitted; it recalls the analogous problem which confronts the municipal lawyer as the result of the ever-increasing bulk of statute law.[10] But the existence of such difficulties does not alter the fact that we must find a recognized place in the general structure of international law for this growing body of common rules on a wide range of questions and give reasonable recognition to their importance in the general exposition of international law. In at least one leading treatise, that of Bustamante, an attempt has been made to face the problem, and the measure of success achieved may be regarded as encouraging.[1] These rules, while made effective by means of the obligation accepted by ratifying States to apply the régime for which they provide, and in this sense constituting obligations between States, have no inherent connexion with the relations of States as such; in essence, they are common rules which apply irrespective of frontiers to matters which are of wider than national concern or, reverting to the first chapter of Grotius,[2] a law 'which is broader in scope than municipal law'. Some of these rules are designed to govern the operation of public services (irrespective of whether they are publicly or privately owned or controlled); others constitute the legal framework of fair competitive enterprise; still others lay down rules for the control of social evils like disease or drug addiction which cannot be effectively regulated on a national basis; others are designed primarily for the unification of private law. These rules are in the fullest sense 'an expression of the life of a true society' and not merely a 'means for regulating external contacts'.[3] As in the case of human rights and of property rights of a distinctively international character, so in the case of these common rules there is in progress a merger of international and national law which is a further illustration of the evolution of the law of nations towards a common law of mankind.

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[1] Gutteridge, 'The Unification of the Law of Bills of Exchange', in this *Year Book*, 12 (1931), pp. 13–30; Arminjon and Carry, *La Lettre de change et le billet à ordre* (1938).

[2] Diena, *L'Unione postale universale* (1950).

[3] Travers, *Le Droit commercial international* (1932–8); Develle, *Le Régime international des voies ferrées* (1935); Hostie, 'Le Transport des marchandises en droit international', in *Recueil des Cours*, 78 (1951) (i), pp. 217–318.

[4] See Mance, *International Road Transport Postal, Electricity and Miscellaneous Questions* (1947), and, for brief summaries of more recent developments, International Road Transport Union, *Handbook of International Road Transport*, 1952 and 1953–4.

[5] Goodman, *International Health Organisations* (1952).

[6] Codding, *The International Telecommunication Union* (1952).

[7] Charles de Visscher, *Le Droit international des communications* (1924).

[8] See *The International Labour Code*, 1951, 2 vols., International Labour Office, Geneva, 1952; see particularly vol. i, Introduction, pp. lxviii–lxxv.

[9] E.g., Holland, *Lectures on International Law* (1933), p. 47.

[10] Cf. Jenks, 'The Conflict of Law-Making Treaties', in this *Year, Book*, 30 (1953), pp. 401–2.

International rules governing the conflict of laws

In a world community consisting of States with separate legal systems conflicts of law will necessarily continue to be governed primarily by separate systems of private international law forming part of each municipal legal system. In this respect there is unlikely to be any change in the existing position as expounded by the leading writers on private international law, namely, that 'private international law is that department of national law which arises from the fact that there are in the world different territorial jurisdictions possessing different laws'[4] and in certain cases different personal laws applicable within the same territorial jurisdiction. But there seems likely to be an increasing number of cases in which conflicts of law will be governed by, and in some cases cannot be governed except by, international rather than national rules. In the light of the developments of the last thirty years it is no longer possible to take the view that private international law is 'not only municipal law and not international law' but 'treats only of matters which are, by the existing law of nations, within a State's exclusive sovereignty to legislate upon as it pleases'.[5]

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[1] *Derecho Internacional Público* (1933–8), especially vol. ii (1934).

[2] See *supra*, pp. 5–6.

[3] Zimmern, op. cit. (*supra*, p. 4, n. 1).

[4] Westlake, *Private International Law*, 7th ed., p. 1. Cf. Cheshire, *Private International Law*, 2nd ed. (1938), p. 1.

[5] Beckett, 'What is Private International Law?', in this *Year Book*, 7 (1926), p. 94.

The international rules governing conflicts of laws fall into two groups. The first consists of common rules of conflict agreed upon by international convention, such as the conventions concerning personal status and civil procedure agreed upon at the Hague Conferences on Private International Law.[1] In some cases such conventions are complementary to conventions for the unification of the substantive law concerned; as illustrations may be mentioned the Geneva Conventions concerning certain conflicts of laws in connexion with bills of exchange[2] and cheques.[3] The United Kingdom and other common law countries have in general tended to hold aloof from such attempts to unify private international law, and this tendency is understandable enough in view of the divergences between civil law and common law conceptions, but the First Report of the Private International Law Committee[4] appointed by the Lord Chancellor in 1952, which examines the conditions under which the United Kingdom might become a party to the 1951 Convention concerning conflicts between the national law and that of the domicil, may presage some gradual modification of this attitude as circumstances allow, though it is inevitable that progress will at best be slow if only because nothing would be gained by attempting to unify the rules of conflict applicable in common law and civil law jurisdictions at the price of destroying such uniformity as already exists in many of the common law jurisdictions. Viewing the matter, however, as one of general policy and principle, it is difficult to resist the conclusion reached by Gutteridge that 'the present state of private international law appears to be such as to give rise to serious misgivings' and calls for sustained effort to 'pave the way for action which will result in general agreement as to the basic principles upon which all systems of the rules of the conflict of laws should be founded'.[5] Even if little should be achieved in unifying the rules of conflict as between the common law and the civil law jurisdictions, the general theory of international law cannot ignore any progress which may be made in such unification as among the civil law jurisdictions and our general concept of the scope and content of international law must include provision for rules of conflict common to a larger or smaller number of States and binding upon them in virtue of international agreement. As was said by the Permanent Court of International Justice in the *Serbian Loans* case, the rules of private international law 'may be common to several States and may even be established by international conventions or customs and in the latter case may possess the character of true international law governing the relations between States'.[6] Westlake, as early as 1856, coined the memorable phrase, 'without the help of public international law the problems of private international law cannot be solved'.[1] The phrase may well have a wider application than he can have envisaged at the time. The general theory of public international law cannot dismiss private international law as something which it can afford to ignore. Public international law constitutes the general framework within which the private international law of each country operates, and as international relationships develop the impact of public international law on private international law must be expected to grow.[2]

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[1] For which see Cheshire, op. cit., pp. 16–18.

[2] Hudson, *International Legislation*, vol. v, pp. 550–8.

[3] Ibid., pp. 915–23.

[4] Cmd. 9068 of 1954.

[5] *Comparative Law* (1946), p. 60.

[6] *P.C.I.J.*, Series A, Nos. 21–22, p. 41.

Quite apart from the extent to which common rules of conflict binding on States may be created by international convention, there are certain types of conflict of law which arise and must be determined internationally and cannot be settled by recourse to any municipal system of private international law. International tribunals are sometimes called upon to resolve conflicts of law in circumstances in which they cannot do so by applying the rules for the choice of law of one of the parties to the dispute. In such cases, the international tribunal must evolve its own rules, as the Permanent Court did in practice in the *Serbian* and *Brazilian Loans* cases. Such rules are not rules of international law in the sense of being uniform rules of the conflict of laws which States are under an obligation to apply in their municipal courts, but they are rules for the choice of municipal law applied by international tribunals.[3]

Questions also arise concerning the law applicable to the legal relations of international organizations with individuals and corporate bodies arising out of various types of transaction.[4] These questions cannot always be appropriately determined by reference to a particular national system of private international law, and the question whether a particular matter is governed substantively by international administrative law or by a particular system of municipal law and, in the second event, by which system of municipal law, may have to be determined by international principles of conflict gradually evolved to meet the new problems arising from the functioning of international organizations.

Conflicts may arise, moreover, not only between different municipal systems of territorial or personal law, and between such systems and international administrative law, but also between international norms evolved in different geographical or functional orbits.[1] In certain respects, the conflict of law-making treaties and conflicts between different international administrative and similar instruments may present problems analogous to those of the conflict of laws rather than to those of conflicting obligations within a single legal system, and these problems can usefully be considered under the general heading of rules of conflict applicable by international bodies to problems arising internationally.

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[1] 'Relations between Public and Private International Law', in *Collected Papers* (1914), p. 297.

[2] Cf. Wortley, 'L'Interaction récente du droit international public et privé', in *Recueil des Cours*, 85 (1954) (i).

[3] Cf. Hammarskjöld, *Juridiction Internationale*, 'La Cour Permanente de Justice internationale et le droit international privé', at pp. 281–2; Jenks, 'The Interpretation and Application of Municipal Law by the Permanent Court of International Justice', in this *Year Book*, 19 (1938), pp. 95–97, and 'The Authority in English Courts of Decisions of the Permanent Court of International Justice', ibid. 20 (1939), pp. 7–8 and 35.

[4] Cf. Jenks, 'The Impact of International Organisations on the Development of Public and Private International Law', in *Transactions of the Grotius Society*, 37 (1951), pp. 46–49.

The number, and in some respects the importance, of the cases of these different types governed by international rules of conflict may, at any rate in the present stage of development of international society, be relatively small in relation to the total volume of transactions governed by municipal systems of private international law, but they cannot be disregarded in formulating a satisfactory theory of the scope and content of contemporary international law.

The law of treaties and other international instruments

Treaties and other international instruments are of such vital importance in all of the divisions of international law distinguished in the preceding analysis that it is convenient to deal with them not as a part of the law governing the relations between States but as a separate division of the law dealing with the conclusion or adoption, validity, operation, effect, interpretation, termination and revision of all instruments governed by international law. By approaching the subject in this manner it is possible to deal simultaneously with instruments concluded between States (irrespective of whether they regulate inter-State relations, protect human rights, confer rights of property, or formulate common rules), instruments concluded between international organizations, instruments concluded between States and international organizations, instruments adopted by international organizations within the limits of their competence which are binding upon States, and instruments adopted by international organizations which apply directly to individuals.[2] Such an approach is likely to be conducive to securing the largest possible measure of uniformity in the law applicable to these varied types of instruments, while at the same time permitting adequate differentiation in the principles and rules applicable to types of instruments which differ widely in functions and legal character.[3] Such an arrangement also has the advantages of furnishing a suitable context for the discussion of instruments governed by international law other than treaties between

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[1] Cf. Jenks, 'The Conflict of Law-Making Treaties', in this *Year Book*, 30 (1953), especially pp. 408–20.

[2] Cf. Lauterpacht, *Report on the Law of Treaties* to the International Law Commission, 5th Session, United Nations Document A/CN.4/63 of 24 March 1953, pp. 14–23.

[3] Cf. McNair, 'The Functions and Differing Legal Character of Treaties', in this *Year Book*, 11 (1930), pp. 100–18.

States and of eliminating unnecessary repetition in the statement of the same or similar principles. There is nothing particularly novel in such a presentation, which represents a natural transposition to the arrangement of the subject-matter of international law outlined above of the manner in which the law of treaties is presented in a large proportion of the standard treatises, including Hall, Oppenheim, Fauchille and Hyde.

The law of international arbitration and judicial settlement

The law of international arbitration and judicial settlement is generally regarded as part of the law governing the relations between States, and the modern tendency appears to be to treat it under the heading of settlement of State differences;[1] so regarded, this part of the law has to a substantial extent been codified in the Hague Conventions on the Pacific Settlement of International Disputes of 1899 and 1907;[2] the Statutes of the Permanent Court of International Justice[3] and the International Court of Justice;[4] and the Draft Covention on Arbitral Procedure prepared by the International Law Commission of the United Nations.[5] Alternatively, it may be regarded as a part of the law of international institutions. On the whole, however, it would seem preferable to regard the law governing arbitration and judicial settlement as a separate branch of international law. While international arbitration and judicial settlement are increasingly among the principal methods of clarifying and developing the law governing inter-State relations and the law of international institutions,[6] their potential scope is wider; they have a similar contribution to make in respect of each of the main divisions of international law distinguished in our analysis. A large measure of uniformity would seem desirable in the law regarding the procedure of international tribunals,[7] the sources of law to be applied by such tribunals,[8] evidence before international tribunals,[9] and the award of damages by such tribunals,[10] irrespective of the branch of international law involved and whether the parties to the proceedings are two or more States, a State and an international organization, a State and an individual or corporate body,[1] two or more international organizations, an international organization and an individual or corporate body, or two or more individuals or corporate bodies who for some special reason have access to an international tribunal. In respect of questions of jurisdiction, interim measures of protection,[2] and the execution of decisions and awards,[3] such uniformity would appear more difficult to attain. While some variations in both the procedure of and the law applied by different tribunals will remain both inevitable and desirable, a larger measure of uniformity is more likely to be attained if the law of international arbitration and judicial settlement is regarded as adjective law applicable (with any necessary adaptations to special circumstances) to all of the different branches of international law which we have distinguished, and the advantages of treating the subject in this manner will probably be found to outweigh in the long run any difficulties involved in separating the law of arbitration and judicial settlement from the law of war and neutrality as an introduction to which it has frequently been treated. From a practical standpoint, the law of procedure, evidence and damages is of vital importance for the effective administration of international law and deserves greater emphasis than it has normally received in the exposition of international law and more intensive consideration *de lege ferenda*. As part of such a revaluation of its importance, the general theory of international law must qualify the historical approach of treating arbitration and judicial settlement as being primarily expedients to avoid recourse to violence by States and must regard them increasingly as the adjective law of an organized community.

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[1] E.g. Oppenheim's *International Law*, 6th ed. revised by Lauterpacht, (1944), vol. ii, pp. 3–105; Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd revised ed. (1945), vol. ii, pp. 1579–1653.

[2] Pearce Higgins, *The Hague Peace Conferences* (1909), pp. 97–179.

[3] Hudson, *The Permanent Court of International Justice—A Treatise*, 2nd ed. (1943).

[4] Lissitzyn, *The International Court of Justice.*

[5] *Report of the International Law Commission covering the Work of its Fifth Session*, 1 June–14 August, 1953, United Nations Document, General Assembly Official Records, Eighth Session, Supplement No. 9 (A/2456).

[6] Cf. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934); Hambro, *The Case Law of the International Court* (1952); Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 2nd ed. (1949).

[7] Cf. Witenberg, *L'Organisation judiciaire, la procédure et la sentence internationales* (1937).

[8] Cf. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927); Sørensen, *Les Sources du droit international* (1946); Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953).

[9] Cf. Sandifer, *Evidence before International Tribunals* (1939).

[10] Cf. Whiteman, *Damages in International Law* (1937–43).

The foregoing analysis has dealt primarily with the structure of the law rather than with its substantive content, but it is clear that a law so conceived will have a substantive content far richer, and far better adapted to modern needs, than a law the essential function of which is conceived as being to define or delimit the respective jurisdictions of States. It may appear presumptuous to attempt so ambitious a task in so brief a compass, without working out in greater detail the full implications of such an attempt to rationalize the presentation of the contemporary law. In extenuation of such a charge it may be pleaded that the need is great. There always tends to be a gap between developments in the practice of international law and the general appreciation of their significance; as the result of the developments which have taken place the gap is now dangerously wide. The foregoing analysis is offered, with some hesitation, as a contribution towards the collective and long-term task of rebuilding the intellectual foundations of a more adequate analysis and exposition of a law of nations which, profoundly transformed by modern developments, is rapidly evolving from a law between sovereign States, concerned primarily with the delimitation of their jurisdiction, towards a common law of mankind. The thesis which has been elaborated can be briefly summarized, at the price of the apparent dogmatism which brevity implies, as follows:

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[1] Carabiber, 'L'Arbitrage international entre gouvernements et particuliers', in *Recueil des Cours*, 76 (1950) (i), pp. 221–315.

[2] Guggenheim, *Les Mesures provisoires de procédure internationale* (1931).

[3] Hambro, *L'Exécution des sentences internationales* (1936).

1. International law can no longer be adequately or reasonably defined or described as the law governing the mutual relations of States, even if such a basic definition is accompanied by qualifications or exceptions designed to allow for modern developments; it represents the common law of mankind in an early stage of development, of which the law governing the relations between States is one, but only one, major division.

2. By the common law of mankind is meant the law of an organized world community, constituted on the basis of States but discharging its community functions increasingly through a complex of international and regional institutions, guaranteeing rights to, and placing obligations upon, the individual citizen, and confronted with a wide range of economic, social and technological problems calling for uniform regulation on an international basis which represent a growing proportion of the subject-matter of the law. The imperfect development and precarious nature of the organized world community is reflected in the early stage of development of the law, but does not invalidate the basic conception.

3. Such a conception implies a complete recasting of the traditional arrangement and presentation of the law; the newer developments can no longer be satisfactorily presented within the framework of the pre-existing structure of the law.

4. The following may be regarded as a convenient presentation of the contemporary public international law of peace:

(*a*) the law governing the structure and law-making processes of the international community, including:

  (i) the law governing the existence, recognition, and succession of States as elements in the structure of the international community,
  (ii) the law of international institutions, including the constitutional, parliamentary, and administrative law of international organizations and the law governing the mutual relations of international organizations,
  (iii) the law governing the law-making processes of the international community, including the status of established custom in an international community with a changed and changing composition

and distribution of influence, the extent to which the collective practice of States expressed through international organizations is a significant element in the growth of custom, the effect of the regulative and quasi-judicial powers of international organizations, the relationship of the law-making treaty to the general body of international law, the role of judicial and arbitral decisions, national and international, in the contemporary development of the law, and the prospects for the codification of international law,

- (iv) the relation of international to municipal law (on a comparative and positive basis, with due regard to any modifications of existing national law or practice necessary to secure a fuller integration of the structure of the international community and to the implications of the merger of the substantive content of international and national law which is taking place in a wide range of fields);

(*b*) the law governing the relations between States, including:

- (i) the traditional core of the law of peace, comprising such questions as territory, the freedom of the seas and sovereignty of the air, jurisdiction, the responsibility of States, intercourse between States, immunities, and similar subjects, and including nationality, the treatment of aliens, extradition, and co-operation in restraint of crime as matters between States,
- (ii) rules governing economic relations between States, including obligations in respect of monetary and general economic policy, the liability of one State to another in respect of loss or damage of an economic character, and financial transactions between States,
- (iii) the rights of States in respect of the application and enforcement of the parts of the law which relate primarily to individuals;

(*c*) human rights protected by international guarantees, including civil liberties and political, economic, and social rights;

(*d*) property rights of a distinctively international character, including copyright and patents;

(*e*) common rules established by international agreement which apply to public services, corporations and individuals rather than to States, a division which comprises a large part of the content of modern law-making treaties, including aviation, much of maritime law, postal matters, sanitary regulations and telecommunications, and those parts of the International Labour Code which are not more conveniently dealt with under human rights;

(*f*) international rules governing the conflict of laws;

(*g*) the law of treaties and other international instruments including the conclusion, validity, effect, interpretation, termination and modification of such instruments; and

(*h*) the law governing international arbitration and judicial settlement, including jurisdiction, procedure, interim measures of protection, evidence, damages, and the execution of decisions and awards.

5. In outlining this method of presentation of the law, special emphasis has been placed on matters which are liable to be overlooked or in respect of which a radical departure from the traditional arrangement is proposed; this is necessary for the purpose of presenting the thesis but is not intended to imply any belittlement of the relative importance of well-settled parts of the law the arrangement of the details of which does not present comparable new problems or to express any judgment concerning the degree of attention which should be given to the older and newer topics in a balanced survey of the law as a whole at any particular stage of its development. Any such presentation is necessarily experimental. It must be tested by experience and adapted from time to time to further developments in the substantive content of the law. In the nature of things it does not eliminate the problem inherent in any arrangement or classification of the law that certain questions can be, and in some cases must be, dealt with in more than one context. Subject to these reservations, it is submitted that it affords a more convenient framework for the presentation of the contemporary law than the less radical modifications of the traditional framework currently in vogue. The adoption of some such arrangement would, it is believed, contribute powerfully to a clearer and wider understanding of the scope and content of international law and in this manner facilitate its further development towards a generally accepted common law of mankind.

THE AMENDING PROCEDURE OF CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

By EGON SCHWELB[1]

I

The amendment of multilateral conventions

It has been said that 'there is hardly a branch of the law of treaties which is free from doubt and, in some cases, from confusion',[2] and that, within it, 'the revision of multilateral treaties constitutes one of the most important aspects of the international legislative process'.[3] For a century and a half, the law governing the problem of the revision of multilateral treaties has been characterized by a marked discrepancy between practice and doctrine. From the maxim *pacta sunt servanda* there follows by simple logic the rule that treaties cannot be amended without the consent of all parties. As regards those parties to an earlier treaty which are not parties to a later treaty amending it, the latter is *res inter alios acta*.[4] There is nothing juridically impossible in the existence of a treaty creating obligations which are incapable of termination, except by agreement of all parties.[5] And yet it has been said of the principal rule of this province of the law, i.e. of the rule requiring the unanimous consent of all parties to an amendment of a multilateral instrument, that it was honoured more in the breach than in the observance.[6] This statement was based on the examination of the practice applied by the Great Powers to the treaties regulating 'the public law of Europe' beginning with the General Act of the Congress of Vienna.[7]

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[1] Deputy Director, Division of Human Rights, United Nations Secretariat. The views expressed in this article are those of the author and do not necessarily reflect the official opinion of the United Nations Secretariat.

[2] Survey of International Law in Relation to the Work of Codification of the International Law Commission (Memorandum submitted by the Secretary General, 1949), U.N. Doc. A/CN. 4/1/Rev. 1, para. 91, p. 52. See also Lauterpacht, 'Codification and Development of International Law', in *American Journal of International Law*, 49 (1955), pp. 17 ff.

[3] Second Report on the Law of Treaties, by H. Lauterpacht, Special Rapporteur, U.N. Doc. A/CN.4/87 (1954), p. 53.

[4] Strupp, *Éléments du droit international public* (translation of 1927), p. 179.

[5] McNair, *The Law of Treaties: British Practice and Opinions* (1938), p. 351.

[6] Jessup, *A Modern Law of Nations* (1948), p. 144.

[7] Tobin, *The Termination of Multilateral Treaties* (1933), chapters iv and v. See, however, the evaluation of the relevant State practice in *Harvard Research in International Law*, Part III, Law of Treaties, Article 22, where an attempt has been made to reconcile practice and doctrine by showing that the cases in which an existing treaty was abrogated or replaced by a later instrument without the express consent of all the original parties were exceptional and limited to a particular type of settlement; that in some of these cases, the interests of the parties to the earlier treaties who were ignored or not consulted as to the later treaties were slight and inconsequential; and that in other cases they acquiesced without protest and thus gave their tacit consent to the abrogation of the earlier treaty and its replacement by the later one.

A small number of judicial pronouncements, mostly dissenting opinions, have been adduced in support of the rule that unanimity of all parties is required for the amendment of a multilateral convention.[1] The Declaration of London of 1871[2] is often cited as an authoritative statement of the principle that unanimous consent is necessary for the amendment of a treaty.[3] In it the Great Powers and Turkey recognized 'that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable settlement'.[4]

The different approach to the problem of modifying various types of treaties is illustrated by two recent events almost coincidental in time and place. The nine-Power Conference held in London from 28 September to 3 October 1954[5] initiated amendments in the North Atlantic Treaty and in the Brussels Pact which were subsequently formalized in Protocols modifying the two instruments signed at the Conference of Ministers held in Paris from 20 to 23 October 1954.[6] As will be shown below,[7] these amendments of treaties of alliance of a regional character were subjected to the strict operation of the unanimity rule. The Memorandum of Understanding on Trieste[8] dated London, 4 October 1954, an arrangement affecting the 'public law of Europe', was concluded not among all the parties to the Peace Treaty with Italy of 1947,[9] but only among the four Powers most directly concerned (Italy, United Kingdom, United States of America, and Yugoslavia). It should be borne in mind, however, that the Memorandum of Understanding does not purport to amend formally the Peace Treaty; it provides for what is called 'practical arrangements' only; and that the Soviet Government notified the Security Council[10] on 12 October 1954 that it took cognizance of the London Agreement.

The growth since the second half of the nineteenth century in the number of quasi-legislative international conventions and in the number of States which were parties to them has made the securing of unanimous consent to their amendment very difficult. The problem became particularly pressing with regard to 'treaties akin to charters of incorporation',[11] and solutions had to be sought when international institutions, 'unions', and general international organizations became a dominant feature of international life.

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[1] Individual remarks by Judge Nyholm (at p. 73) and dissenting Opinion by Deputy Judge Negulesco (at p. 129) in Advisory Opinion No. 14, Series B, No. 14, *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (1927); separate Opinions by Judges van Eysinga (at pp. 131 ff.) and Schücking (at pp. 148 ff.) in the *Oscar Chinn* case, Series A/B, No. 65 (1934).

[2] *British and Foreign State Papers*, vol. 61, p. 1198.

[3] Hudson, *The Permanent Court of International Justice, 1920–1942* (1943), p. 132.

[4] Tobin, op. cit., pp. 220–1, holds that the design of the parties to the London Declaration was different and that it was not intended as an endorsement of the principle that unanimous consent was necessary for revision by subsequent treaty.

[5] Final Act of 3 October 1954, Cmd. 9289.

[6] Cmd. 9304, pp. 56 and 32.

[7] *Infra*, p. 61.

[8] Cmd. 9288; U.N. Doc. S/3301.

[9] Cmd. 7022; *U.N. Treaty Series*, vol. 50, No. 747.

[10] U.N. Doc. S/3305.

[11] McNair, 'The Function and Differing Legal Character of Treaties', in this *Year Book*, 11 (1930), at pp. 116–18.

Various methods have been adopted to meet the difficulty.[1] One consisted in the insertion in the original multilateral instrument of so-called revision clauses whereby the convening of a conference may be requested by a stipulated number of States for the purpose of proposing amendments to the convention concerned, or whereby periodic conferences for review are envisaged.[2] Such clauses, of course, do not by themselves afford relief from the requirement of unanimity among all parties to the convention. In other cases it was agreed that those parties to an earlier convention which accept a new or revised text would *inter se* be bound by the new text, while the original version would continue to bind such parties to the earlier convention as do not accept the later. The best-known examples of this method are afforded by the 1899 and 1907 Conventions on the Pacific Settlement of Disputes and the 1899 and 1907 Conventions respecting the Laws and Customs of War on Land. In the matter of the treatment of prisoners of war, this method was applied to four sets of provisions which have been adopted over a period of fifty years: the chapters on prisoners of war of the 1899 and 1907 Regulations and the Geneva Conventions of 1929 and 1949.

Another approach to the problem is represented by the practice initiated by the International Postal Union, which, as early as 1878, adopted an important departure from the principle of amendment by unanimous consent of all parties. Since then the various Universal Postal Conventions have provided that 'from the date fixed for the entry into force of the Act adopted by a Congress, all the Acts of the preceding Congress are repealed',[3] and also make provision for a revision, during the interval between Congresses, of the convention currently in force, such revision requiring unanimity if it concerns basic provisions, a two-thirds majority if a modification of great importance is involved, and a simple majority in the case of changes of minor importance. The Acts of the later Congress supersede the earlier ones and the parties to the earlier Acts are simply left the choice of accepting the later Acts or of ceasing to be members of the Universal Postal Union.[4]

The method of including in basic instruments special amendment clauses which confer upon a majority, usually a qualified majority, of the States Parties the power to amend the original treaty even against the wish of a minority has become the most common practice. Isolated instances of basic instruments of international institutions not providing for a specific amendment procedure and nevertheless modified without the concurrence of all parties have, however, also occurred.[1]

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[1] Cf. Charles Rousseau, *Principes généraux du droit international public* (1944), vol. i, p. 514: 'Exceptions au principe qui subordonne des traités à l'assentiment unanime des Parties.'

[2] For the distinction of revision clauses from amendment clauses, which will be dealt with presently, see *Handbook of Final Clauses*, U.N. Doc. ST/LEG/1, 1951, p. 182.

[3] Article 15(4) of the Universal Postal Convention of 1947, *Yearbook of the United Nations, 1947–1948*, pp. 895–6, and Article 23 (3) of the Universal Postal Convention of 1952 (*Actes du Congrès de Bruxelles*, 1952, p. 14).

[4] Articles 21 to 23 of the Convention of 1947 and Articles 25 to 27 of the Convention of 1952.

Where a multilateral instrument contains an amendment clause the question of fundamental principle with which States have been faced in dealing with treaties not providing for an amendment procedure does not arise; the rule that a treaty or any provision thereof must not involve a breach of a treaty obligation previously undertaken by one or more of the contracting parties does *not* apply 'to treaties revising multilateral conventions in accordance with their provisions'.[2]

The present article is concerned with provisions which apply the fourth of the four methods just described, namely, with an instrument which contains elaborate provisions concerning amendment. The article is mainly devoted to an analysis and interpretation of Articles 108 and 109 of the Charter. It is therefore outside its scope to pursue the inquiry into the rules of general international law on the amendment of multilateral conventions any further.[3] Instead, it is proposed to examine here in some detail the various types of amendment clauses and their application, with particular regard to the constitutional law of international organizations.

II

General review of the amendment clauses of constitutions of international organizations and related instruments[4]

Article 26 of the League Covenant is of great importance for the development of the constitutional law of international organizations. It provided that amendments to the Covenant were to take effect when ratified by the Members of the League whose representatives composed the Council and by a majority of the Members of the League whose representatives composed the Assembly. The Covenant, however, contained a very important qualification relating to the effect of an amendment: it provided that no amendment should bind any Member of the League which signified its dissent therefrom; but in that case, the dissenting Member should cease to be a Member of the League. 'This system imposed strong pressure on

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[1] Hudson, op. cit., p. 132, refers to the modification by a Protocol of 21 April 1926 of the Convention of 7 June 1905 creating the International Institute of Agriculture.

[2] Draft Article 16 formulated in his Second Report on the Law of Treaties by H. Lauterpacht, Special Rapporteur: U.N. Doc. A/CN.4/87, p. 35.

[3] See Jenks, 'The Conflict of Law-making Treaties', in this *Year Book*, 30 (1953), pp. 401 ff., in particular pp. 412 ff., 418, 422 ff., and 442 ff. Dr. Jenks's article became available to the writer only when the manuscript of the present article had been completed.

[4] See Jenks, 'Some Constitutional Problems of International Organizations', in this *Year Book*, 22 (1945), pp. 65–68.

States to accept the will of the majority, but fundamentally retained the traditional rule that a State could not be bound without its consent. At the same time it marked a departure from the rule that a treaty could not be amended without the consent of all the parties; State Members of the League—other than the Members of the Council—had no vested right to block a change in the treaty.'[1]

The original Constitution of the International Labour Organization provided that amendments 'which are adopted by the Conference by a majority of two-thirds of the votes cast by the Delegates present shall take effect when ratified by the States whose representatives compose the Council of the League of Nations and by three-fourths of the Members'. The Constitution of the I.L.O. has been amended four times, in 1922, 1945, 1946 and 1953. The amendment of 1945 introduced a fundamental change in the provisions regulating the amendment process itself and the amendment of 1953 also has some bearing on it. The development of this branch of the constitutional law of the I.L.O. is described in this article below.[2]

In the period between the two world wars the inclusion in basic instruments of international institutions of provisions for their amendment had become so customary that the absence of such a provision in the Statute of the Permanent Court of International Justice was considered as a 'gap',[3] an 'unfortunate lacuna'.[4] While this 'gap' in the Statute of the Court may or may not have been deliberate,[5] there have been examples of treaties, including at least one concluded in the inter-war period and intended to become the constitution of an international organization, which expressly stipulated for the principle of unanimous consent to its amendment: the Convention concerning the Pan-American Union, signed at Havana on 18 February 1928, but not ratified, provided in Article 13 that it could not be amended except in the manner in which it had been adopted. Contrary to the provisions of Article 26 of the Covenant, the withdrawal of a Member which did not accept an amendment adopted by all the others was not contemplated. If one single State Member had opposed it, an amendment could never have come into force. Although Article 111 of the Bogotá Charter of the Organization of American States of 1948, which will be considered below,[6] did not maintain the unanimity principle, it retained the idea that opposing States were neither bound by an amendment nor forced to leave the Organization on account of their opposition to an amendment.

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[1] Jessup, op. cit., p. 143.

[2] *Infra*, p. 63.

[3] Lauterpacht, *The Function of Law in the International Community* (1935), pp. 72–73.

[4] Hudson, op. cit., p. 130.

[5] Lauterpacht, op. cit., p. 73, n. 1. It certainly was not a 'genuine' gap. In spite of the absence of a provision on amendments the law provided a clear, though inconvenient, answer to the question how the Statute could be amended, namely, by unanimous consent of all the parties to it.

[6] *Infra*, p. 60.

Chapter XI of the Dumbarton Oaks 'Proposals for the Establishment of a General International Organisation', which, with one modification, has become Article 108 of the Charter, and Article 109 of the Charter which was added at San Francisco, form the principal subject of this article and will be treated in some detail in the parts that follow.

The basic instruments of the other inter-governmental organizations which emerged during and after the Second World War, most of which eventually were brought into relationship with the United Nations as specialized agencies, provide for amending procedures. Such provisions will be found both in the instruments drafted before the San Francisco Conference and in those which came into being under the auspices of the United Nations. Among the former, we mention Article VIII of the Agreement for the United Nations Relief and Rehabilitation Administration (U.N.R.R.A.) adopted in Washington on 19 November 1943;[1] Article XX of the Constitution of the Food and Agriculture Organization (F.A.O.),[2] initiated in May 1943 at Hot Springs, Virginia, adopted on 16 October 1945; Article 94 of the Convention on International Civil Aviation adopted in Chicago on 7 December 1944, establishing the International Civil Aviation Organization (I.C.A.O.);[3] Article VIII of the Articles of Agreement of the International Bank for Reconstruction and Development,[4] and Article XVII of the Articles of Agreement of the International Monetary Fund,[5] both drafted at Bretton Woods, New Hampshire, July 1944, and opened for signature on 27 December 1945. Among the constitutions which were adopted after the San Francisco Conference, the following may be mentioned: the Constitution of the United Nations Educational, Scientific and Cultural Organization (U.N.E.S.C.O.), adopted in London on 16 November 1945, Article XIII;[6] the Constitution of the World Health Organization (W.H.O.) signed at the International Health Conference in New York on 22 July 1946, Article 73;[7] the Constitution of the International Refugee Organization (I.R.O.) adopted by the General Assembly of the United Nations on 15 December 1946, Article 16;[8] and the Convention of the

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[1] Woodbridge (ed.), *The History of UNRRA*, vol. iii, p. 24; *American Journal of International Law*, 38 (1944), Supplement, p. 33.

[2] *Yearbook of the United Nations, 1946–1947*, p. 697; also Cmd. 6955 (1946).

[3] *Yearbook of the United Nations, 1946–1947*, p. 740; Cmd. 6614 (1945); *U.N. Treaty Series*, vol. 15, p. 295.

[4] *Yearbook of the United Nations, 1946–1947*, p. 764; Cmd. 6546 (1944); *U.N. Treaty Series*, vol. 2, p. 134.

[5] *Yearbook of the United Nations, 1946–1947*, p. 782; Cmd. 6546 (1944); *U.N. Treaty Series*, vol. 2, p. 39.

[6] *Yearbook of the United Nations, 1946–1947*, p. 716; Cmd. 6963 (1946); *U.N. Treaty Series*, vol. 4, p. 275.

[7] *Yearbook of the United Nations, 1946–1947*, p. 800; Cmd. 7458 (1948); *U.N. Treaty Series*, vol. 14, p. 185.

[8] *Yearbook of the United Nations, 1946–1947*, p. 815; Cmd. 7934 (1950); General Assembly Resolution 62 (I); *U.N. Treaty Series*, vol. 18, p. 3.

World Meteorological Organization (W.M.O.) of 11 October 1947, Article 28.[1] The Convention on the Inter-governmental Maritime Consultative Organization (I.M.C.O.) (Geneva, 1948)[2] provides for its amendment in Articles 52–54. The provisions on the amendment and review of the Havana Charter for an International Trade Organization[3] are in its Articles 100 and 101. The General Agreement on Tariffs and Trade of 30 October 1947 (G.A.T.T.)[4] contains an amendment clause in Article XXX. G.A.T.T. is not a specialized agency, but reference will occasionally be made to it because of the similarity of the legal problems involved.

It may now be convenient to review some of the general features of the amending process as provided in these instruments. Most, though not all, of these amendment clauses provide for two phases in the amendment process, viz. (1) the establishment of the text of the amendment through and by an organ of the organization, (2) the ratification or acceptance[5] of this amended text by the Member States.

(*a*) *The stages of the amending process*

The Covenant of the League did not regulate the first phase; it was interpreted to require the adoption of an amendment by the Assembly of the League.

Some of the constitutions, on the other hand, dispense with the requirement of ratification or acceptance, at least in the case of some amendments which are considered with more or less justification as of minor importance. Where this is the case, the 'quasi-legislative' activities of the international organ concerned, the results of which take effect upon ratification by all or by the prescribed number of States Parties, has been transformed into a genuine legislative function which does not require ratification or acceptance.

The U.N.R.R.A. Agreement of 1943 distinguished between three types of amendments, namely, (*a*) amendments involving new obligations for member Governments; (*b*) amendments involving modification of certain clauses relating to the Central Committee and other committees, and to the appointment of the Director General; and (*c*) 'other amendments'.

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[1] *U.N. Treaty Series*, vol. 77, No. 998, p. 144.

[2] Not in force. U.N. Doc. E/CONF.4/61.

[3] Not in force. Final Act of the United Nations Conference on Trade and Employment, Havana, Cuba, 1947–8; Cmd. 7375 (1948).

[4] *U.N. Treaty Series*, vol. 55, p. 194.

[5] The term 'acceptance' used in some of these instruments connotes 'any and every means whereby a State . . . agrees to be bound by a treaty' (Report on the Law of Treaties by J. L. Brierly, Special Rapporteur, U.N. Doc. A/CN.4/23 of 14 April 1950, para. 66). The term 'acceptance' was widely used in texts adopted during and immediately after the Second World War. Later, the organs of the United Nations expressed their preference for the traditional method (signature followed by ratification, or accession) (First Report on the Law of Treaties by H. Lauterpacht, U.N. Doc. A/CN.4/63 of 24 March 1953, pp. 95 ff.).

'Other amendments', (*c*), would have taken effect, apparently for all members of U.N.R.R.A., on adoption by a two-thirds vote of the Council, the organ on which all member Governments were represented. It seems that the amendments mentioned under (*b*), involving modification of what might be called 'entrenched clauses', would also have taken effect on adoption in the Council by a two-thirds vote, including the vote of the 'Big Four' of the time, and would not have been dependent on acceptance by member States.

The Constitution of F.A.O. also distinguishes between amendments 'involving new obligations for Member nations' and 'other amendments'. The latter take effect on adoption by the Conference by a vote concurred in by a two-thirds majority of all the members of the Conference without the necessity of acceptance by the member nations.

The Constitution of U.N.E.S.C.O. facilitates amendments in a similar way. It stipulates, however, that for an amendment to come into effect on approval by the General Conference alone, without the requirement of subsequent acceptance by member States, it must involve neither new obligations for member States nor fundamental alterations in the aims of the Organization. The amendments to the U.N.E.S.C.O. Constitution which were enacted under this procedure by the General Conferences of 1951, 1952 and 1954 are dealt with in this article below.[1] The 1952 and 1954 amendments dealt, *inter alia*, with the composition of the Executive Board, the latter also with its basic structure, and entered into force immediately upon adoption by the General Conference. This provides a marked contrast with the history of the amendment to the original Constitution of the I.L.O. affecting the composition of the Governing Body, which was adopted by the International Labour Conference in 1922 and received the required ratifications and entered into force, only twelve years later, in 1934.[2] The Convention of the W.M.O. stipulates that amendments to it which do not involve new obligations for members shall come into force upon approval (apparently in the Congress of the Organization) by two-thirds of the members which are States. The Havana Charter for an International Trade Organization would also have been open to the simple procedure of amendment by a two-thirds vote in the Conference in all cases of amendments not purporting to alter the obligations of members.

The question of what does and what does not constitute a new obligation for member States within the meaning of the amendment clauses just discussed inevitably presents difficulties. The practice of U.N.E.S.C.O. to be described later may throw some light on this problem. Thus it was held that the minor increase in expenditure caused by the widening of the Executive Board from eighteen to twenty, and from twenty to twenty-two members, the structural change in the constitution of the Executive Board, and the amendment providing for the admission of non-self-governing territories to associate membership did not constitute amendments involving any new obligations for member States or any fundamental change in the aims of the Organization.

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[1] *Infra*, p. 65.

[2] The recent amendments to the Constitution of the I.L.O. had a much smoother passage; see *infra*, p. 63.

(*b*) *The voting procedure*

Whether the effectiveness of an amendment depends on its adoption in the competent organ alone or on its subsequent ratification or acceptance by the constitutional authorities of member States, most constitutions require a two-thirds majority for the adoption of an amendment by the competent body of the Organization (I.L.O.,[1] U.N.R.R.A., F.A.O., I.C.A.O., U.N.E.S.C.O., W.H.O., I.R.O., W.M.O.).[2] The same would apply under the Charter of I.T.O. and the Convention on the I.M.C.O. The Covenant of the League is, of course, an exception.[3]

Amendments of the Articles of Agreement of the Bank and of the Articles of Agreement of the Fund must, before acceptance by the members is sought, be approved by the Board of Governors of the agency concerned, i.e. by an organ consisting of one governor and one alternate appointed by each member (Article V, Section 2 (*a*), and Article XII, Section 2 (*a*), respectively). The voting in both bodies is by a majority of the votes cast. It should be noted, however, that the basic instruments of the two agencies embody the principle of weighted votes and thus combine majority and weighted voting.[4]

The Constitution of the I.L.O. requires adoption by the Conference by a majority of two-thirds of the votes cast by the delegates present; the Constitutions of the I.R.O. and I.T.O. adoption by two-thirds of those 'present and voting'. In the Constitution of F.A.O., on the other hand, it is expressly stipulated that a two-thirds majority of all the members of the Conference is required. The U.N.R.R.A Agreement made certain amendments dependent on the concurring vote of all the members of the Central Committee, i.e. China, the U.S.S.R., the United Kingdom, and the United States of America. The I.M.C.O. Convention will require adoption of amendments by a two-thirds majority vote of the Assembly, including the concurring votes of a majority of the members represented on the Council.

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[1] Original and amended texts of Article 36 of the Constitution.

[2] A two-thirds majority of the members which are States.

[3] See *supra*, under (*a*).

[4] See Aufricht in *Proceedings of the American Society of International Law*, 48 (1954), pp. 84–85, and McIntyre in *International Organization*, 8 (1954), pp. 484 ff. On the acceptance by members of amendments to the Articles of Agreement thus approved, see *infra*, under (*c*).

(*c*) *Numbers of ratifications and acceptances required*

Most of the basic instruments require ratification or acceptance by two-thirds of the members of the Organization (I.L.O.,[1] U.N.R.R.A., F.A.O., U.N.E.S.C.O., W.H.O., I.R.O., W.M.O.; also I.T.O. and I.M.C.O.).

In the case of I.C.A.O. its Assembly is vested with the right to specify the number of States whose ratification is required, but the number so specified shall be not less than two-thirds of the total number of Contracting States. Certain amendments to G.A.T.T., including those affecting the amendment procedure, require acceptance by all the Contracting Parties, while others become effective upon acceptance by two-thirds of the Contracting Parties. The Articles of Agreement of the Bank and the Fund require acceptance by three-fifths of the members, having four-fifths of the total voting power. For certain types of amendments, however, acceptance by all members is required.[2]

(*d*) *On whom are amendments binding?*

In the cases enumerated in paragraph (*b*) above, i.e. where a constitution dispenses with the requirement of ratification or acceptance, and to the extent to which it does so, the amendments put into effect by virtue of the legislative power of the competent organ become binding on all members, at least as long as they remain members. Where ratification or acceptance is required, the constitutions vary from agency to agency. Amendments to the I.L.O. Constitution[3] and to the Constitution of U.N.E.S.C.O., duly adopted and ratified by the required number of States, take effect for all members. This is expressly provided for amendments to the Constitution of W.H.O. and was provided, by implication, for such amendments to the Constitution of I.R.O. as did not involve new obligations for members. It should be noted, however, that the Constitutions of I.L.O. (Article 1 (5)) and of I.R.O. (Article 1 (10)) make express provision for the withdrawal of members from the Organization. The Constitution of W.H.O. does not deal with the withdrawal of members. In 1948 the United States of America made its instrument of acceptance of the Constitution of W.H.O., which was then already in force, subject to the provision of a joint resolution of Congress expressing 'the understanding that, in the absence of any provision in the World Health Organisation Constitution for withdrawal from the Organisation, the United States reserves its right to withdraw from the Organisation on a one-year notice'. For very important practical reasons this statement was not treated as a reservation, but was referred to the

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[1] Under the 1945 and 1953 texts of Article 36.

[2] For the voting on amendments by the Boards of Governors of the two agencies see *supra*, under (*b*).

[3] Original and amended texts.

World Health Assembly, which unanimously approved a resolution recognizing the validity of the ratification of the Constitution by the United States. This action was held to constitute an interpretation by the competent organ of W.H.O. to the effect that the ratification by the United States was not inconsistent with the terms of the Constitution of W.H.O.[1] Subsequently a number of States members of W.H.O. gave notice of their withdrawal from the Organization. These notices were interpreted to mean that these countries 'will no longer participate actively in the work of the Organisation'.[2] The original Constitution of U.N.E.S.C.O. did not contain provisions concerning the right of members to withdraw from the Organization. An amendment expressly providing for this right was, however, adopted in 1954. As far as the Bank and the Fund are concerned, amendments which have passed through the prescribed amendment process become in general effective for all members. It will be recalled, however, that acceptance by all members is required for some amendments. Members of both the Fund and the Bank may withdraw (Articles XV and VI respectively). Under the basic instruments of U.N.R.R.A.,[3] F.A.O., I.R.O.,[4] and W.M.O.,[4] on the other hand, an amendment comes, or came, into force for those members only which have ratified or accepted it. Thus, under these constitutions it is possible for some of the members to be bound by the original text of the instrument, while others are bound by amendments to it.

Between the two positions—recognition of the binding force of duly ratified amendments on all members, including those dissenting, and recognition of the freedom of dissenting States to refuse acceptance of an amendment, without thereby ceasing to be a member of the Organization and without having to leave it—some instruments steer a middle course. The I.C.A.O. Assembly can, if in its opinion the amendment is of such a nature as to justify this course, provide in its resolution recommending adoption that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the convention. It follows that if such a recommendation is not made, the amendment is not binding on States remaining in the Organization but not ratifying the amendment. The contracting parties to G.A.T.T. may decide that any amendment made effective through acceptance by two-thirds of their number is of such a nature that any contracting party which has not accepted it within a period specified by the contracting parties shall be free to withdraw from the Agreement, or to remain a contracting party with the consent of the contracting parties. Similarly, under the Charter of I.T.O. it was envisaged that non-acceptance of an amendment by a member within a specified period should effect suspension from membership provided the Conference included a statement to that effect in the decision approving the amendment. The Conference would also have had the right to determine the conditions under which suspension was not to apply. The Assembly of the I.M.C.O. will have similar rights.

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[1] World Health Organization, *Official Records*, No. 13, p. 76. See Schachter, 'The Development of International Law through the Legal Opinions of the United Nations Secretariat', in this *Year Book*, 25 (1948), pp. 122 ff., and Liang in *American Journal of International Law*, 44 (1950), p. 123.

[2] *Yearbook of the United Nations, 1948–1949*, p. 1045; ibid., *1950*, p. 943; ibid., *1951*, p. 931.

[3] Only amendments involving new obligations for members. Amendments involving modifications of the 'entrenched' clauses, if adopted by the Council by a two-thirds vote including the votes of the 'Big Four', were not subject to acceptance by members.

[4] Only amendments involving new obligations for members.

(*e*) *Regional instruments*

Here we find that amendment clauses contained in the basic instruments vary from region to region.

Article 19 of the Pact of the Arab League of 22 March 1945[1] provides that 'the present Pact may be amended with the approval of two-thirds of the members of the League, especially for the purpose of strengthening the ties between the member States, of creating an Arab Court of Justice, and of regulating the relations of the League with such international bodies as may be created in the future to guarantee security and peace'. It contains the proviso that any State which does not accept an amendment may withdraw when the amendment goes into effect, without being bound by the provisions of the preceding article which provides for one year's notice in the case of withdrawal unconnected with an amendment to the Pact.

The Charter of the Organization of American States (Bogotá, 1948)[2] provides in Article III that 'amendments to the present Charter may be adopted only at an inter-American Conference convened for that purpose. Amendments shall enter into force in accordance with the terms and the procedure set forth in Article 109'. Article 109 provides that the Charter shall enter into force among the ratifying States when two-thirds of the signatory States have deposited their ratifications. It shall enter into force with respect to the remaining States in the order in which they deposit their ratifications.

As regards the establishment of the text by the Inter-American Conference, which is an organ of the Organization, the Charter itself does not lay down all the relevant voting rules. It provides that each State has the right to one vote[3] and that the regulations of the Inter-American Conference shall be prepared by the Council of the Organization and submitted to the member States for consideration.[1] The regulations[2] provide, in Article 43, that the decisions of plenary sessions, of the Steering Committee and of the working committees shall require the affirmative vote of a majority of the States participating in the Conference. No exception appears to have been stipulated for the voting on the adoption of amendments to the Charter of the O.A.S.

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[1] *American Journal of International Law*, 39 (1945), Supplement, p. 266.

[2] *Annals of the Organisation of American States*, vol. i, No. 1 (1949), p. 76.

[3] Article 34.

An amendment ratified by two-thirds of the States does not bind States which have not consented, nor are they forced to leave the O.A.S. This arrangement can, therefore, as in the case of some of the specialized agencies, lead to different members of the Organization being bound by different sets of provisions. The opinion has been expressed that if a far-reaching amendment has come into force it may be difficult to retain the unamended Charter in operation with regard to the 'remaining States'.[3]

Amendments to the Statute of the Council of Europe of 5 May 1949 can originate in the Committee of Ministers or, under certain conditions, in the Consultative Assembly.[4] Recommendations for the amendment of certain provisions of the Statute require unanimity in the Committee of Ministers (Article 20 (*a*)). Others can be proposed by the Committee of Ministers by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee (Article 20 (4)). An amending Protocol shall come into force when it has been signed and ratified on behalf of two-thirds of the members. Amendments to certain provisions relating to the Consultative Assembly and to matters of finance shall come into force when approved by the Committee of Ministers and by the Consultative Assembly. Under Article 7, any member of the Council of Europe may withdraw by formally notifying the Secretary-General of its intention to do so.

The North Atlantic Treaty of 4 April 1949[5] does not contain an amendment clause, but only a review clause (Article 12) which provides that after the Treaty has been in force for ten years, or at any time thereafter, the parties shall, if any of them so requests, consult together for the purpose of reviewing the Treaty, having regard to the factors then affecting peace and security in the North Atlantic area, including the development of universal as well as regional arrangements under the Charter of the United Nations for the maintenance of international peace and security. The unanimity of all parties is therefore a prerequisite of an amendment; the entry of new members into the Organization is considered an amendment of the Treaty and requires the agreement of all parties.[1] After the North Atlantic Treaty has been in force for twenty years any party may cease to be a party one year after its notice of denunciation has been given (Article 13). The nine-Power Conference held in London in 1954 'recorded the view of all the Governments represented [which were not all the members of N.A.T.O.] that the North Atlantic Treaty should be regarded as of indefinite duration'.[2]

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[1] Article 38.

[2] Approved by the Council of the Organization on 1 April 1953. See *Handbook for Delegates. Organisation of American States*, Tenth Inter-American Conference, Caracas, Venezuela, 1954, pp. 9 ff., and *Report on the Activities of the Organisation of American States, 1948–1953*, submitted by the Pan-American Union to the Tenth Inter-American Conference, p. 1.

[3] Kunz, 'The Bogotá Charter of the Organisation of American States', in *American Journal of International Law*, 42 (1948), p. 568.

[4] Cmd. 7778; Cmd. 8293; *American Journal of International Law*, 43 (1949), Supplement, p. 162.

[5] *U.N. Treaty Series*, vol. 34, p. 243; Cmd. 7789 (1949); *American Journal of International Law*, 43 (1949), Supplement, p. 159.

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The Brussels Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence between Belgium, France, Luxembourg, the Netherlands and the United Kingdom of 17 March 1948[3] does not contain a general provision on amendment or review, but provides (Article IX) that the parties may, by agreement, invite any other State to accede to the Treaty on conditions to be agreed between them and the State so invited. The 'Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany', Paris, 23 October 1954,[4] provides, therefore, in Article II, that it shall enter into force, apart from two other conditions, when each of the parties to the North Atlantic Treaty has notified to the Government of the United States of America its acceptance thereof. The Protocol modifying and completing the Brussels Treaty (by the accession of the Federal Republic of Germany and the Italian Republic and by structural changes in its substantive provisions)[5] stipulates in Article VI that it shall enter into force when, *inter alia*, all instruments of ratification of the Protocol have been deposited with the Belgian Government. Among the signatories whose ratification is thus required are, of course, all the original parties to the Treaty of 1948.

The South-East Asia Collective Defence Treaty, Manila, 8 September 1954,[6] stipulates (Article VII) that other States may, by unanimous agreement of the parties, be invited to accede to it. Under its Article X, any party may cease to be a party one year after its notice of denunciation has been given.

[1] See Article III of the Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, London, 17 October 1951, Cmd. 8407; and Article II of the Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany, Paris, 23 October 1954, Cmd. 9304, p. 56.

[2] Cmd. 9289, Section IV, p. 9.

[3] Cmd. 7599; *American Journal of International Law*, 43 (1949), Supplement, p. 59.

[4] Documents agreed on by the Conference of Ministers held in Paris, 20–23 October 1954, Cmd. 9304 (1954), pp. 56–57.

[5] Cmd. 9304, pp. 32–35; see also the Final Act of the Nine-Power Conference held in London 28 September–3 October 1954; Cmd. 9289 (1954).

[6] Cmd. 9283 (1954).

III

Amendments to the Constitution of the International Labour Organization and of U.N.E.S.C.O.

In view of their importance for the development of the law on the subject, more detailed reference may conveniently be made here to the problems which have arisen in this connexion in relation to the International Labour Organization and U.N.E.S.C.O.

(*a*) *Amendments to the Constitution of the International Labour Organization*

The original constitution of the I.L.O. was contained in Part XIII of the Peace Treaty of Versailles and in identical parts of the other peace treaties by which the First World War was concluded. Article 422 of the Peace Treaty of Versailles (Article 36 of the Constitution) provided that amendments 'to this Part of the present Treaty' (i.e. the Constitution of the I.L.O.) 'which are adopted by the Conference by a majority of two-thirds of the votes cast by the Delegates present shall take effect when ratified by the States whose representatives compose the Council of the League of Nations and by three-fourths of the Members'.[1] The original text of the Constitution has so far been modified four times, by amendments adopted in 1922, 1945, 1946, and 1953, respectively. Only one amendment was put into effect under the amendment procedure contemplated in Article 422 of the Peace Treaty of Versailles. It was an amendment to Article 393 of the Peace Treaty (Article 7 of the Constitution) and changed the composition of the Governing Body of the I.L.O. The amendment was adopted at the Fourth International Labour Conference on 2 November 1922. It did not, however, enter into force until twelve years later, on 4 June 1934.

At the Twenty-sixth Session of the International Labour Conference, held in Philadelphia in 1944, the Governing Body was requested to appoint a committee to consider the future constitutional development of the Organization[2] and in the following year, at the Twenty-seventh Session of the International Labour Conference held in Paris, an Instrument of Amendment was adopted on 16 October 1945.[3] This Instrument of Amendment of 1945 is of particular concern in relation to the present article for the reason that it effected a permanent amendment of Article 36 of the

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[1] The corresponding provisions of the other treaties ending the First World War were: Saint-Germain-en-Laye, Article 367; Trianon, Article 350; Neuilly-sur-Seine, Article 284; Sèvres (not ratified), Article 409.

[2] International Labour Conference, Twenty-sixth Session, Philadelphia, 1944, Record of Proceedings, Appendix XI, p. 526; Committee report in Appendix V, p. 318; record of adoption in plenary, p. 258.

[3] International Labour Conference, Twenty-seventh Session, Paris, 1945, Record of Proceedings, Appendix XIV, p. 470; Committee report in Appendix VII, pp. 379 ff.; record of discussion and adoption in plenary, p. 262.

Constitution, which regulates the procedure of amendment. This change was described in the report of the Constitutional Committee to the Conference in the following terms:[1]

> 'The new procedure of amendment proposed by the Committee involves a substantial liberalization of the conditions governing the entry into force of amendments provided for in Article 36 of the Constitution of the Organisation as at present in force. . . . Under the new procedure proposed by the Committee the proportion of Members which must ratify or accept an amendment in order to bring it into force has been reduced from three-quarters to two-thirds. . . . The Committee has not thought it necessary to give any Member of the Organisation a veto on the entry into force of amendments to the Constitution such as is provided for in the Charter of the United Nations, but after a discussion in which opposing views were expressed it adopted the view that any amendment to the Constitution should command the full support of a majority of the major industrial powers. . . .'

The Committee therefore proposed, and the Conference adopted, a new text of Article 36 of the Constitution[2] which provided that: 'Amendments to this Constitution which are adopted by the Conference by a majority of two-thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two-thirds of the Members of the Organisation including five of the eight Members which are represented on the Governing Body as Members of chief industrial importance. . . .' It is of particular interest to record the position of the United States Government Delegate with regard to this amendment to the Constitution. He stated in the Conference[3] as follows:

> 'When the Committee decided to omit from the new amendment clause the proposed provision that future amendments imposing new obligations with respect to Conventions should not be binding on any individual Member without its consent, the representative of the United States Government explained the difficulties that would arise if an attempt should ever be made to impose on the United States Government without its consent an obligation which under the Constitution of the United States it would not be able to accept. But in the hope that no such situation will in fact arise, the United States Government representative will vote in favour of the Instrument of Amendment.'

Accordingly, the Instrument of Amendment was adopted. It entered into force on 26 September 1946. In 1946 another Instrument of amendment of the Constitution of the I.L.O. was adopted. It provided for a comprehensive revision of the Constitution and entered into force on 20 April 1948. It did not, however, affect the Article relating to amendments. The Thirty-sixth Session of the International Labour Conference[4] adopted on 25 June 1953 another Instrument for the amendment of the Constitution of the I.L.O. which increased the number of Government Representatives in the Governing Body from sixteen to twenty, the number of representatives of employers and workers from eight to ten, and the number of Members of the Organization of chief industrial importance also from eight to ten. This Amendment also affected Article 36 because of the special role which Members of chief industrial importance are accorded in the process of amending the Constitution. There being now ten Members of this class, it is provided that amendments to the Constitution, duly adopted by the Conference, shall take effect when ratified or accepted by two-thirds of the Members of the Organization, including five of the ten Members which are represented on the Governing Body as Members of chief industrial importance. Thus, an amendment no longer needs the support of a majority of the Members of chief industrial importance, as under the 1945 Amendment, but can take effect against the opposition of one-half of these Members. This change in the Constitution entered into force on 20 May 1954.

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[1] Report of the Constitutional Committee, Appendix VII of the Record of Proceedings of the Twenty-seventh Session, para. 23, pp. 385–6; and see Jenks in this *Year Book*, 23 (1946), p. 306.

[2] Article 4 of the 1945 Instrument of Amendment.

[3] Record of Proceedings of the Twenty-seventh Session of the International Labour Conference, sitting on 5 November 1945.

[4] International Labour Conference, Thirty-sixth Session, Geneva, 1953, Record of Proceedings, Appendix XVI, p. 440; Committee report, Appendix XI, p. 423; record of discussion and adoption in plenary, pp. 245 ff.

The Standing Orders of the International Labour Conference contain special provisions regulating the procedure for consideration by the Conference of proposed amendments to the Constitution of the Organization.[1] One of the purposes of these provisions is to guarantee the right of Members to have appropriate advance notice of amendments. It is provided, therefore, that any proposal for the amendment of the Constitution shall only be considered by the Conference if it has been included in the agenda of the Conference at least four months before the opening of the session. At its 1953 session the International Labour Conference decided to delete a provision of its Constitution which had become obsolete, although the question had not been on its agenda.[2] The Constitution of the I.L.O., it should be recalled, provides expressly for the right of Members to withdraw from the Organization (Article 1 (5) of the Constitution).

(*b*) *Amendments to the Constitution of the United Nations Educational, Scientific and Cultural Organization*[3]

Article XIII of the U.N.E.S.C.O. Constitution adopted by the London Conference for the Establishment of an Educational, Scientific and

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[1] Section F, Articles 46 and 47 of the Standing Orders at present in force. See *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference*, 1954 ed., p. 54.

[2] The obsolete provision was the last sentence of Article 7 (5) of the Constitution, introduced by the Amendment of 1922, according to which, of the sixteen Members represented on the Governing Body, six were to be non-European States. (See Article 2 of the 1953 Instrument of Amendment and pp. 243–253 of the Record of Proceedings of the Thirty-Sixth Session of the International Labour Conference, Twentieth Sitting of 22 June 1953.)

[3] Dr. H. Saba, Legal Adviser of U.N.E.S.C.O., had the kindness to read through the parts of this article which deal with the Constitution of U.N.E.S.C.O. and to let the writer have the benefit of his comments and advice. These are gratefully acknowledged. The responsibility for the article remains, of course, the writer's.

Cultural Organization on 16 November 1945 stipulates that proposals for amendments to it 'shall become effective upon receiving the approval of the General Conference by a two-thirds majority'. It provides, however, that those amendments which involve fundamental alterations in the aims of the Organization or new obligations for the Member States shall require subsequent acceptance on the part of two-thirds of the Member States before they come into force. Since its coming into force on 4 November 1946 the Constitution has been amended three times through the adoption, by the General Conference, of amendments which were deemed not to require subsequent acceptance by Member States.

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The Sixth Session of the General Conference (Paris, June–July 1951) adopted an amendment to the membership Article (Article II) which makes it possible for territories or groups of territories which are not responsible for the conduct of their international relations, to be admitted as Associate Members. Applications for such membership have to be made on behalf of the prospective Associate Member by the Member or Authority which has responsibility for its international relations. The General Conference has power to determine the nature and extent of the rights and obligations of Associate Members.[1] This the General Conference did by a resolution adopted at the same session.[2] At this session also, the General Conference inserted in the Constitution (Article IV) a provision that a Member State shall have no vote in the General Conference if it was in arrears with its contributions for two years.[3] In the resolutions by which it adopted these amendments, the General Conference expressly stated that they did not involve any fundamental change in the aims of the Organization or any new obligation for Member States.

The General Conference of 1951 further declared itself 'in favour of the principle of biennial sessions of the General Conference' (the original Constitution in Article IV (9) provided for annual sessions) and in favour of 'the adoption at its Seventh (1952) Session of the amendments to the Constitution and to the various Rules of Procedure which will be required for the implementation of that principle'.[4] It also made arrangements for the drafting by the Director-General of the amendments which were 'necessitated by the adoption of the system of biennial sessions of the Conference'.[5] The amendments implementing this decision, and amendments consequential upon it, were adopted at the Seventh Session (Paris, November–December 1952).[6] 'It was recognized that the adoption of the system of biennial sessions would inevitably increase the duties and responsibilities of the Executive Board.'[1] The 1952 amendments therefore not only introduced the provision that the General Conference should meet in ordinary session every two years (Article IV, para. 9 (*a*)), but also increased the number of the members of the Executive Board from eighteen to twenty, revised the functions of the Board, particularly its responsibilities between ordinary sessions of the General Conference, in relations with the United Nations and with regard to the requesting of Advisory Opinions from the International Court of Justice. They affected Articles IV, V and VI of the Constitution.

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[1] U.N.E.S.C.O. Records of the General Conference, Sixth Session, Paris, 1951, Resolutions, p. 83.

[2] Ibid., Resolution 41.2.

[3] A modification of the amendment of 1951 was enacted in 1952.

[4] Records of the General Conference, Sixth Session, Paris, 1951, Resolutions, Resolution 43, p. 93.

[5] Ibid., Resolution 43.13.

[6] U.N.E.S.C.O. Records of the General Conference, Seventh Session, Paris, 1952, Resolutions, Resolution 41, p. 103.

The Eighth Session of the General Conference (Montevideo, November–December 1954) made several changes in the Constitution, two of them being of considerable interest:

(*i*) The original Constitution provided, in Article V A (1), that the Executive Board should consist of eighteen members[2] *elected by the General Conference*[3] from among the delegates appointed by the Member States and that (para. 4) in the event of death or resignation, a substitute should be appointed from among the delegates of the Member State concerned. The original Constitution (Article V B 11, in 1952 renumbered Article V B 12) also stated that the members of the Executive Board 'shall exercise the powers delegated to them by the General Conference on behalf of the Conference as a whole *and not as representatives of their respective Governments*'. The 1954 amendments to Article V introduce a structural change in the Executive Board. They are to the effect that the Board shall consist of *twenty-two members, each of whom shall represent the Government of the State of which he is a national.* In the event of death or resignation, members of the Board shall be replaced by persons appointed by the Executive Board *on the nomination of the Government of the State the former member represented.* It is now further provided (Article V B 12, as amended in 1954) that '*although the members of the Executive Board are representatives of their respective Governments* they shall exercise the powers delegated to them by the General Conference on behalf of the Conference as a whole'.[4]

(*ii*) The original Constitution did not contain provisions on the right of Members to withdraw from U.N.E.S.C.O. The 1954 Conference adopted a new paragraph 6 of Article II providing that any Member State or Associate Member of the Organization may withdraw from the Organization by notice addressed to the Director-General. Such notice shall take effect on 31 December of the year following that during which the notice was given. No such withdrawal shall affect the financial obligations owed to the Organization on the date the withdrawal takes effect. As to the withdrawal of an Associate Member, it is provided that notice of withdrawal shall be given on its behalf by the Member State or other authority having responsibility for its international relations.[1]

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[1] U.N.E.S.C.O. Report to the United Nations, 1952–3, p. 176.

[2] Twenty under the 1952 Amendment.

[3] All italics supplied.

[4] U.N.E.S.C.O. Doc. 8C/ADM/35, Montevideo, 8 December 1954, Report of the Administrative Commission to the Eighth Session of the General Conference, Resolution 35, pp. 30–32. The final records of the Montevideo Conference were not yet available at the time of writing.

The Constitution of U.N.E.S.C.O. contains two provisions of a procedural character relating to amendments: (i) It provides (Article XIII (i) *in fine*) that draft texts of proposed amendments shall be communicated by the Director-General to the Member States at least six months in advance of their consideration by the General Conference. (ii) It further provides that the General Conference shall have power to adopt by a two-thirds majority rules of procedure for carrying out the provisions of the amendment article. At its 1951 session, the U.N.E.S.C.O. General Conference, invoking this provision of the Constitution, adopted rules on the procedure for the amendment of the Constitution which contain not only the 'six months rule' of the Constitution (Rule 103) but also provide, *inter alia* (Rule 104), that the General Conference shall not introduce substantive changes in draft amendments unless the proposed changes have been communicated to Member States at least three months before the opening of the session. The General Conference may, however (Rule 105), without the necessity for prior communication to Member States, adopt changes which are purely matters of drafting and any changes designed to embody in a single text substantive proposals properly communicated. It was further provided (Rule 106) that in case of doubt the Conference shall decide by a two-thirds majority whether any proposed change in a draft amendment falls within the definition given in Rule 104 or within that given in Rule 105.[2] The application of these rules, in particular the interpretation of the terms 'substantive changes' and 'drafts and proposals which are purely matters of drafting', gave rise to certain difficulties. The General Conference clarified the position, at its 1954 Session, by amending the existing rule to provide that 'in case of doubt, a proposed amendment shall be deemed to be an amendment of substance unless on a vote being taken there is a two-thirds majority in favour of interpreting the amendment as an amendment of form falling under the provisions of Rule 105'.[3] The Eighth General Conference further decided that amendments must also be communicated to Associate Members of U.N.E.S.C.O.[4]

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[1] U.N.E.S.C.O. Doc. 8C/ADM/35, Montevideo, 8 December 1954, Report of the Administrative Commission to the Eighth Session of the General Conference, Resolution 35, p. 30.

[2] U.N.E.S.C.O. Records of the General Conference, Sixth Session, Paris, 1951, Resolutions, Resolution 43.2, pp. 93–94.

[3] Rule 106 of the Rules of Procedure as amended in 1954. U.N.E.S.C.O. Doc. 8C/ADM/35, Resolution 37.38, p. 39.

[4] Amendment to Rule 105; ibid.

IV

Articles 108 and 109 and their place in the system of the Charter

Chapter XI of the 'Proposals for the Establishment of a General International Organisation, Dumbarton Oaks, Washington, 7 October 1944'[1] contemplated that amendments to the Charter of the United Nations should come into force for all Members of the Organization, when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by the Members of the Organization having permanent membership on the Security Council and by a majority of the other Members of the Organization. This proposal became Article 108 of the Charter. However, it underwent one change: instead of the requirement of ratification by the five permanent members of the Security Council *and by a majority of the other members* there was substituted the requirement of ratification *by two-thirds of the members*, *including* all the (five) permanent members of the Security Council. This modification was proposed because it tended to equalize to a certain extent the difference between the permanent members of the Council and the other Members of the Organization. It also reduced the risk of those other Members being placed in the dilemma of having either to accept as valid an amendment not ratified by them or to withdraw from the Organization.[2]

From the San Francisco Conference there emerged a second and alternative procedure for the amendment of the Charter by way of a General Conference of the Members of the United Nations. The sponsoring Governments proposed an additional provision which contemplated the convening of a general conference of the Members of the United Nations for the purpose of reviewing the Charter. The original proposal provided that the decision fixing the date and place of the conference should require a *three-fourths* vote of the General Assembly and the vote of any seven members of the Security Council. At a later stage of the proceedings the Great Powers agreed to reduce the voting requirements in the General Assembly from *three-fourths* to *two-thirds*. Thus amended, the proposal became Article 109, paragraph 1.

Various delegations proposed that a definite time for the calling of the conference be stipulated in the Charter. These proposals failed to receive the required two-thirds majority. As a concession to the smaller Powers, the United States Delegation proposed a new provision to the effect that if such a general conference has not been held before the tenth annual meeting of the Assembly following the entry into force of the Charter, the proposal to call such a general conference shall be placed on the agenda of that meeting of the General Assembly. It is in this United States proposal that lies the origin of the present paragraph 3 of Article 109. As an additional concession the proposal was eventually modified to provide that a simple majority only of the General Assembly would be required on that occasion for the decision to call the review conference.

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[1] Cmd. 6560 (1944); *Yearbook of the United Nations, 1946–1947*, p. 9.

[2] Report of the Rapporteur of Committee 1/2 on Chapter XI (Amendments), U.N.C.I.O. Docs., vol. vii, pp. 461 ff.

The Great Powers suggested that amendments recommended by the review conference should take effect in the same way as amendments adopted by the General Assembly under the Dumbarton Oaks Proposals, when ratified by the permanent members of the Security Council and by a majority of the other Members of the Organization. They accepted an amendment corresponding to that which had led to a modification of what is now Article 108, namely, that ratification by two-thirds of the Members, including the five Great Powers, should be required. This is what became the present Article 109, paragraph 2.[1]

As a consequence, the Charter contains the following provisions on its amendment.[2]

Article 108 establishes the General Assembly procedure. It reads:

> 'Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.'

Article 109 establishes two variations of the General Conference procedure. It reads:

> '1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each Member of the United Nations shall have one vote in the conference.
>
> '2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all the permanent members of the Security Council.
>
> '3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.'

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[1] For a detailed record of the *travaux préparatoires* of Article 109, see the report of the Rapporteur of Committee 1/2 quoted *supra*, p. 69, n. 2.

[2] Amendments to the Statute of the International Court of Justice, which forms an integral part of the Charter (Art. 92), are effected by the same procedure as is provided by the Charter for amendments to the Charter, subject to provisions which may be adopted concerning the

Article 18 (2) of the Charter provides that decisions of the General Assembly on important questions shall be made by a two-thirds majority; it lists a number of subjects which shall be included among those questions. Article 18 (3) provides that decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a (simple) majority. The opinion has been expressed[1] that the decision by which a new category of 'important' questions is added to those enumerated in paragraph 2 constitutes an amendment to Article 18 (2) and that the procedure of this amendment, provided by paragraph 3, constitutes an exception to the provision of Chapter XVIII (i.e. Articles 108 and 109), regulating the amendment procedure. The question has also been raised whether such an 'amendment' of Article 18 (2) of the Charter can be repealed by decision of the General Assembly or whether it requires the amendment procedure of Articles 108 or 109.[2] It is not proposed to enter into an examination of this special problem here.

V

The amending power under the Charter of the United Nations

Under the Charter of the United Nations the amending power is unlimited in substance and scope. Amendments 'doubtless comprise not only amendments in the narrower sense but also additions to the Charter'.[3] No reservation is made with regard to the fundamental provisions concerning the purposes of the United Nations. Provisions which go beyond or are in conflict with the present purposes can be enacted through the amending process.[4] The most radical changes in the purposes and principles of the United Nations, in its structure and organization, in the competence of its organs, including the jurisdiction of the International Court of Justice, can be brought about by the procedure regulated by Articles 108 and 109.[5]

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participation of non-Members of the United Nations parties to the Statute (Art. 69 of the Statute). The Court has power to propose amendments to the Statute (Art. 70). As far as provisions for its amendment are concerned, the Statute of the International Court of Justice differs fundamentally from that of its predecessor, in both its original and its revised versions of 1920 and 1929, respectively.

[1] See Kelsen, *The Law of the United Nations*, p. 183; see also the statement by Mr. Espinosa y Prieto of Mexico in the 459th plenary meeting of the General Assembly on 27 November 1953, where he said that the determination of additional categories of questions to be decided by a two-thirds majority is itself 'a basic question, which many consider tantamount to a revision of the Charter' (Doc. A/PV.459, para. 12).

[2] Kelsen, op. cit., p. 184 and n. 6.

[3] Ross, *Constitution of the United Nations* (1950), p. 37.

[4] Ibid.

[5] As regards the amending power under the Covenant of the League of Nations, it was claimed by France to be subject to certain limitations which were held to derive from the fact that the Covenant of the League and the Peace Treaty of Versailles were contained in one and the same instrument (Statement by M. Léon Bourgeois in the 12th plenary meeting of the Assembly). The proposition was challenged by others, in particular by the representatives of Portugal and Switzerland. Schücking and Wehberg indicated in the second edition of *Die Satzung des Völkerbundes* (1924), p. 31, in examining the French arguments, that there was a certain degree of internal and substantive dependence between Articles 1 and 22 of the Covenant and the Peace

An amendment which has passed through the deliberative body (General Assembly or General Conference) and has received the required ratifications comes into force for all Members of the United Nations. This is expressly provided for the General Assembly procedure (Article 108); there can be no doubt, however, that this rule also applies to amendments recommended by a General Conference and duly ratified. Where States, in establishing inter-governmental organizations, wished to provide that the result of the amending process should be binding only on those States which accepted it, they have expressly so provided.[1] In accepting these provisions, Member States other than the Big Five have invested the 'amending power' with the right to legislate for them. 'This imposes rather serious obligations on Members who have not voted in favour of, and have refused to ratify, the amendments in question. The provision [of Article 108] . . . actually means that all Members, except the five permanent members of the Security Council, endorse a blank cheque obligating themselves to accept in advance international commitments which their duly accredited representatives have voted against and which the constitutional authorities of the State . . . have refused to ratify.'[2] A Member State other than a permanent member of the Security Council which finds itself in the predicament that two-thirds of the Members, including the Big Five, have ratified an amendment which it has opposed and continues to oppose, has no choice but either to accept the situation with good grace, or to withdraw from the Organization altogether.

The Dumbarton Oaks proposals did not expressly consider the question whether a Member would have the right to withdraw from the Organization. They were, however, interpreted to mean that withdrawal was to be excluded. The United Kingdom commentary on the Dumbarton Oaks proposals stated that 'amendments so adopted [i.e. according to what eventually became Article 108] would be binding on all Members, even on those voting against them. They are not allowed to withdraw from the Organization on this ground, as was provided in the Covenant of the League of Nations. This is undoubtedly a great innovation in international procedure, but it was thought to be necessary if the Organization was to be able to adapt itself to the rapidly changing world of today.'[3] The text of the Charter as adopted has remained silent on the question of withdrawal. The San Francisco Conference approved a Declaration, however, stating

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Treaties. In the third edition of their work (1931), vol. i, p. 33, they considered the French arguments 'manifestly erroneous'. Göppert (*Der Völkerbund. Organisation und Tätigkeit* (1938), p. 39, n. 29) expressed the opinion that there was no doubt that all provisions of the Covenant could be amended under its Article 26.

[1] See the Constitutions of U.N.R.R.A., F.A.O., I.R.O., and W.M.O., referred to above.

[2] Goodrich and Hambro, *Charter of the United Nations* (2nd ed., 1949), p. 538, commenting on Article 108 of the Charter. See also Wilcox in *Annals of the American Academy of Political and Social Science*, 296 (1954), p. 2.

[3] Cmd. 6571 (1944), para. 56.

that if a Member because of exceptional circumstances feels constrained to withdraw it is not the purpose of the Organization to compel that Member to continue its co-operation in the Organization.[1] Among the reasons which might thus lead to the withdrawal of a Member State the Declaration mentions two situations connected with the amendment process: one the case of a Member whose 'rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept'; the other the failure of 'an amendment duly accepted by the necessary majority in the Assembly or in a General Conference . . . to secure the ratification necessary to bring such amendment into effect'. Different opinions have been expressed concerning the legal significance of this Declaration. According to some it 'is of no legal importance'.[2] The other school of thought maintains that in the absence of an express prohibition of the right of withdrawal the Members of the United Nations must be deemed to have preserved it[3] or that the Declaration could be considered as a generally accepted reservation with the same binding force as the Charter itself.[4]

Article 108 provides that amendments will come into effect 'for all Members'. If, as the prevailing opinion assumes, Members of the United Nations have retained the right to withdraw from the Organization and if the coming into force of an amendment in which a Member has not concurred and which it finds itself unable to accept is a good reason for exercising the right of withdrawal, then Article 108 must be read subject to this qualification, viz. that amendments come into force for all Members of the Organization *as long as they remain in the Organization.* Imp

VI

The amending process under the Charter of the United Nations

The amending process is vested either in the General Assembly plus the ratifying authorities of the Member States (Article 108), or in the General Assembly, the Security Council, the General Conference and the ratifying authorities of the Member States (Article 109). In the first case (Article 108) the Security Council has no part to play in the amending process. 'In the initial stages, at least, the will of a majority of two-thirds of the members prevails. No single state or small group of states can prevent an amendment from being approved and sent on to the member nations for further consideration and possible ratification.'[5] In the second case, the General Conference procedure (Article 109), the function of the Security Council is limited to deciding, together with the General Assembly, whether a General Conference should be held, and for this decision the vote of any seven members of the Security Council is sufficient. The privileged role of the permanent members of the Security Council comes into play only in the ratification phase of the amending process.

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[1] *Yearbook of the United Nations, 1946–1947*, p. 21; Goodrich and Hambro, op. cit., pp. 143–44.

[2] Kelsen, op. cit., p. 127.

[3] See Oppenheim, *International Law*, vol. i (8th ed. by Lauterpacht, 1955), § 168 *d*.

[4] Goodrich and Hambro, op. cit., p. 144.

[5] Wilcox, 'How the United Nations Charter has Developed', loc. cit., p. 2.

Voting in the General Assembly and in the General Conference

The provisions concerning the majorities required by Articles 108 and 109 for their respective purposes are worded differently in the two articles. In addition, both wordings differ from the language used in the general provisions governing the voting in the General Assembly (Article 18). This latter article speaks of 'a two-thirds majority of the members present and voting' (para. 2) and 'a majority of the members present and voting' (para. 3). The words 'present and voting' do not occur in Articles 108 and 109. These differences raise questions of interpretation which may become of great practical importance. They will be examined here together with other provisions of Article 109 (1) and Article 109 (3) which do not deal with the majority required to adopt a proposed amendment, but with the majority in the General Assembly required for a decision to convene a General Conference for the purposes of reviewing the Charter. Article 109 (1) requires 'a two-thirds vote of the members of the General Assembly' for the General Assembly's concurrence in the convening of the Conference. Article 109 (3), regulating the special case of the 1955 Assembly, provides for the necessity of 'a majority vote of the members of the General Assembly'. Moreover, the French text of the Charter is not quite in agreement with the English text. The English text of Article 109 (1) speaks of 'a two-thirds vote *of the members* of the General Assembly'; the French text of 'un vote de l'Assemblée générale à la majorité des deux-tiers', without adding 'des membres [de l'Assemblée générale]'. Similarly, the English text of Article 109 (3) requires 'a majority vote *of the members* of the General Assembly', while the French text stipulates 's'il en est ainsi décidé par un vote de la majorité de l'Assemblée générale', again omitting any reference to the members of the General Assembly. General rules of interpretation would lead to the conclusion that the difference in the wording of Articles 108 and 109, on the one hand, and of Article 18, on the other, are indicative of a difference in meaning such that the provisions of Articles 108 and 109 would represent exceptions from the less stringent majority rules of Article 18. This is also the opinion of most writers on the subject.[1] One commentator[2] has held, however, that despite the difference in wording—and despite the considerable difficulties such a construction encounters in the case of Article 108—both Articles 108 and 109 can and should be interpreted as subject to the general rule of Article 18, namely, that the majorities *of those present and voting are contemplated.* In his view, the fact that the question is comprehensively regulated in another provision of the Charter (Article 18), has enabled the drafters of Article 109 to dispense with a restatement of 'technical details'. He argues that since the French text of Article 109 (3) makes this interpretation possible, the same interpretation should also be applied to Article 109 (1), where, in our view, it can hardly be reconciled with the text, and even to Article 108, where, it is submitted, it is contrary to the text. This would mean that Article 108, which in this regard follows the Dumbarton Oaks text[1] without any change, should be interpreted in the light of an allegedly possible, but by no means conclusive, interpretation of the French version of Article 109 (3), which was added in San Francisco. Although it has been rightly pointed out that the records of the San Francisco Conference contain no indication of the reasons for the difference in the voting mathematics laid down in Articles 108 and 109 and those of Article 18,[2] the difference in treatment does, in fact, make very good sense. If two-thirds of all the members of the General Assembly have voted for an amendment in the General Assembly, the probability that two-thirds of all the Members of the United Nations will ratify it is greater than if only a smaller number, namely, two-thirds of the members present and voting, had supported it. If the proceedings in the General Assembly show that less than two-thirds of the members of the General Assembly have *voted* for an amendment, then there is no great probability that two-thirds of the Members will *ratify* it. Similarly, in the case of Article 109 (3), if less than a simple majority of all members of the General Assembly have voted for convening a General Conference, there is little likelihood that the Conference will lead to fruitful results. Not only is there no authority for interpreting such widely divergent formulations as meaning the same thing, but there are very good reasons of substance to support the distinction. It follows, therefore, that a two-thirds majority of all the Members of the United Nations (40 of the present membership of 60) must vote for the calling of a General Conference under Article 109 (1) and an absolute majority of all the Members (31 out of 60) must vote for the calling of the Conference at the 1955 session. Similarly, both in the 'General Assembly procedure' and in the 'General Conference procedure' a two-thirds majority of all the members of the deliberative body is required for the 'adoption' of an amendment or the 'recommendation' of an alteration. Under the present membership of 60, 40 members must vote in the General Assembly for an amendment, while it is legally immaterial whether the remaining 20 vote for, or vote against, or abstain, or are absent.

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[1] Goodrich and Hambro, op. cit., p. 537, n. 1; Kelsen, op. cit., p. 818.

[2] Kopelmanas, *L'Organisation des Nations Unies*, p. 152, n. 1.

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[1] Chapter XI.

[2] Goodrich and Hambro, loc. cit.; Kopelmanas, loc. cit.

Opinions may differ on the question how the term 'two-thirds vote of the conference' in Article 109 (2) is to be interpreted. According to what has just been said, the principle of Article 18 (two-thirds majority *of the members present and voting*) does not apply to Article 109 (2).[1] But does 'two thirds vote of the conference' mean 'two-thirds of the Members of the United Nations' or 'two-thirds of the participants of the Conference'? These figures need not necessarily be identical because while all the Members of the United Nations must, of course, be invited to the General Conference, there is no certainty that all will attend. Article 109 (1) provides that each Member of the United Nations shall have one vote in the Conference and supports, therefore, the contention that 'a two-thirds vote of the conference' is a vote of two-thirds of the Members of the Organization irrespective of whether all have sent plenipotentiaries to the Conference. On the other hand, it can be claimed that 'the Conference' consists of those participating in it, and that States not represented (as distinct from those represented, but temporarily absent) are not members of the Conference and do not count for the purpose of Article 109 (2). If this latter interpretation were adopted the number of votes required for the adoption of a recommendation by the Conference might conceivably be smaller than the number of votes required for the adoption of an amendment in the General Assembly. Assuming that only 57 States would care to attend the General Conference, a vote of 38 would under this interpretation be sufficient to carry the recommendation. The ratification by 40 States, including the five permanent members of the Security Council would, however, be required for the alteration to take effect.

The 'adoption' of 'amendments' and the 'recommendation' of 'alterations'

Under Article 108 the General Assembly may 'adopt amendments'; under Article 109 the General Conference may 'recommend alterations' in the Charter. It is submitted that the 'adoption' by the General Assembly is a 'recommendation' to Governments to ratify the amendments, and that the 'recommendation' of an alteration cannot take place if they are not 'adopted' by the Conference. In this regard there is, therefore, no difference of substance between Articles 108 and 109.[2] 'Alteration' does not seem to convey a notion fundamentally different from 'amendment', although conceivably a quantitative difference may lie behind the difference in expression. The authors of Article 109, a provision which had not been contemplated in the Dumbarton Oaks proposals, may have had in mind that the 'alteration' of the Charter, as a result of the 'review' of the Charter at the Conference, will be more comprehensive than an amendment or a series of amendments adopted by the General Assembly in the course of a routine session which would normally deal with a proposed amendment as one of some fifty or more items on its agenda.[1] The expression 'alteration' may, therefore, have some connexion with the notion of 'reviewing the Charter' as a whole. But, although the word 'review' signifies that the whole body of the Charter is to be examined, it does not follow that the reviewing process must of necessity lead to the recommendation of an alteration. The process of amending the Charter through the General Assembly, contemplated in Article 108, may lead to changes in every single Article of the Charter, while the General Conference may recommend the amendment of a limited number of provisions only or may refrain from recommending any alteration of the Charter whatsoever.

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[1] Robinson, 'The General Review Conference', in *International Organisation*, 8 (1954), p. 318, considers this to be an open question.

[2] 'This terminological difference has . . . no legal importance': Kelsen, *The Law of the United Nations*, p. 147.

Can Article 109 be applied only once?

In his article entitled 'The General Review Conference',[2] Dr. Jacob Robinson holds that one of the differences between the method provided for in Article 108, the 'General Assembly procedure', and the method contemplated in Article 109, i.e. the 'General Conference procedure', is that Article 108 is of a permanent nature and can be applied as long as the Charter (with this Article) continues in force, while at least Article 109 (3) can be applied only once. If, he adds, one accepts the interpretation given by Mr. Evatt at the San Francisco Conference, the whole of Article 109 can be applied only once (7 U.N.C.I.O. 211). Should the 1955 General Assembly decide not to convoke such a conference, the whole method will, in the learned author's opinion, have gone for ever. In the present writer's opinion there are some statements which can be made with reasonable assurance of their correctness with regard to the question—or, rather, series of questions—which Dr. Robinson has raised, while about others there is bound to remain considerable doubt:[3]

(*a*) The convening of the Conference under the privileged conditions of paragraph 3 cannot be repeated. Paragraph 3 ties the convening of the Conference by a simple majority to one occasion, namely, that a conference has not been held before the tenth annual session and that consequently the proposal to call a conference is *ipso jure* on the agenda of the General Assembly. If a conference is convened under paragraph 3, no other Review Conference can be called by a mere majority of the General Assembly.

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[1] It would, of course, be conceivable to convene a special session of the General Assembly devoted exclusively to the question of amendments to the Charter.

[2] In *International Organisation*, 8 (1954), p. 316.

[3] In what follows no reference is made to Security Council action because the concurrence of the Security Council in the convening of the Review Conference is governed by the same rules in both para. 1 and para. 3 of Article 109.

(*b*) If the General Assembly at its tenth session decides not to call the Review Conference, then the General Conference can also not be convened under the privileged conditions of paragraph 3. In this sense, provided by 'the whole method' only the procedure contemplated in paragraph 3 is meant, the present writer respectfully agrees with the proposition that in that case 'the whole method will have gone for ever'.

The propositions under (*a*) and (*b*) exhaust the problems on which positive and unqualified language can be used.

(*c*) Neither the text, nor the purpose of the provision, nor the *travaux préparatoires* appear to exclude the convening of a conference under paragraph 1 in case the tenth session of the General Assembly should decide not to convene the Conference under paragraph 3. The General Assembly would not in that case be prevented from convening a conference at any later date under the conditions of paragraph 1, i.e. a two-thirds majority. This opinion is based on the consideration that no time factor is included in paragraph 1 and that the right of the General Assembly to call the conference under paragraph 1 is laid down unconditionally, in quite general and absolute terms. There are, however, also arguments for the opposite view; they could be based on the wording of paragraph 3. '. . . the conference shall be held *if* so decided by a majority vote of the members of the General Assembly. . . .' From this one could argue *a contrario* that, if not so decided, the conference, meaning any conference, shall not be held.

(*d*) If a general conference is held, either one convened under paragraph 3, or one convened at any other time under paragraph 1, then probably no second conference can be held by virtue of Article 109. The fact that the Charter in both Article 109 (1) and Article 109 (3) speaks of the Conference in the singular ('a General Conference', 'the conference', 'such a conference', 'cette conférence', 'en vue de la convoquer', 'la conférence') is not in itself conclusive. These expressions can denote both a class and an individual conference. The absence of any indication of a generalized use of the singular, however, carries great weight. If the authors had contemplated the possibility of a series of review conferences, they would probably have said that review conferences may be held whenever the General Assembly fixes the date and place, or used similar language.

(*e*) The remark made by the distinguished delegate of Australia in the twenty-second meeting of Committee I/2 of the San Francisco Conference, to which Dr. Robinson refers, apparently supports the interpretation just given under (*d*). A caveat should be added, however; Dr. Evatt's statement might have been of greater relevance for the interpretation of the Charter if the proposal of the sub-committee, which was then before Committee I/2 and which the Australian representative supported, had been adopted and had become part of the Charter. The Australian delegate stressed the fact that, under the proposal of the sub-committee then before the Committee, there would be only one conference with powers to review the Charter.[1] The proposal of the sub-committee was, however, rejected in a later—the twenty-fourth—meeting of the Committee,[2] and in a still later meeting the United States proposal, which eventually became paragraph 3 of Article 109, was adopted.[3] This United States proposal provided for the addition of the second method of convening the Conference. The explanation given by the distinguished delegate of Australia, therefore, related to a text different from that which was eventually adopted, and represented the opinion of a delegation whose views did not prevail.

(*f*) Even if we assume that the interpretation suggested under (*d*) and (*e*) is correct and that no further Review Conference with the constitutional prerogatives set forth in that Article can be convened once one such conference has been held, there is no doubt that the General Assembly could at any time decide to convene a conference of States Members for the purpose of examining the Charter and making recommendations for its alteration. The recommendations of a conference convened outside the scope of Article 109 would not, to be sure, take effect when ratified by two-thirds only of the State Members. It would be within the powers of the General Assembly, however, to adopt the recommendations of the Conference as amendments under Article 108 with the effect that the ratification provision of that Article would apply to them.

The two variations of the General Conference procedure: paragraphs 1 and 3 of Article 109

A General Conference of the Members of the United Nations for the purpose of reviewing the Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. This means that any Member of the United Nations can, at any time after October 1945, propose the holding of such a conference. If the proposal is supported by the stated majorities in the General Assembly and in the Security Council, the General Conference will be held.

A decision by the Security Council to convene, together with the General Assembly, a General Conference of the Members of the United Nations for the purpose of reviewing the Charter is hardly a 'procedural matter'. Nevertheless, by virtue of Article 109 (1), which provides for an exception[4] to Article 27, the vote of any seven members is sufficient. It is not necessary that among the members voting in favour of convening the Conference, all the permanent members of the Council be included. The 'veto' does not apply. The convening of a General Conference for the purpose of reviewing the Charter under Article 109 (1) has been suggested by Member States on several occasions,[1] but no general conference has so far been convened.

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[1] 7 U.N.C.I.O. Documents, p. 211.

[2] Ibid., p. 219.

[3] Ibid., pp. 220 and 251.

[4] Another exception is Article 10 of the Statute of the Court, which provides that candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected and that any vote of the Security Council whether for the election of judges or for the appointment of the members of a conference to solve a deadlock concerning

While Article 109 (1) provides for the normal procedure for reviewing the Charter in a General Conference, Article 109 (3) provides for special facilities for one occasion and one occasion only. These special facilities apply 'if such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter'. The tenth annual session of the General Assembly will be held in 1955.

The special facilities provided for the 1955 Session of the General Assembly are twofold:

(i) The automatic inclusion in the agenda. The Charter provides that the proposal to call a conference shall be on the agenda of the tenth session if no such conference has been held before. Although the Rules of Procedure of the General Assembly do not contain a special provision regulating the procedure on this unique occasion, it is clear that the normal rules concerning an inscription of an item in the agenda do not apply. Neither a proposal by a Member State nor a recommendation by the General Committee to insert the item in the agenda is required. A decision by the General Assembly not to include the item in the agenda of the tenth session, or to delete it therefrom, would be unconstitutional. The item will be on the agenda, not only on the provisional agenda.[2]

(ii) A simple majority, not a two-thirds majority, is required.

Apart from these two exceptions there is no difference between the 1955 General Assembly and the convening by the General Assembly and the Security Council of a General Conference in other years. The voting of the

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the elections of judges shall be taken without any distinction between permanent and non-permanent members of the Security Council. The 'Uniting for Peace' Resolution of the General Assembly, 377 A (V) of 3 November 1950, provides that emergency special sessions of the General Assembly shall be convened within twenty-four hours of the receipt of a request for such a session, *inter alia*, from the Security Council, on the vote of any seven members thereof.

[1] Proposal by Cuba in 1946 (U.N. Docs. A/102, A/C.1/49/Rev. 1 and A/C.1/58); proposal by Argentina in 1947 (U.N. Doc. A/351); the question was also examined by the Interim Committee (see report of the Interim Committee to the General Assembly on the problem of voting in the Security Council of 15 July 1948, Doc. A/578, where the Interim Committee recommended to the General Assembly to consider at its third regular session (1948) 'whether the time has come or not to call a general conference, as provided for in Article 109 of the Charter'); see also Docs. A/AC.18/SC.3/2 and A/AC.18/SC.3/3); proposal by Argentina in 1948 (Doc. A/C.2 and 3/74), Joint Second and Third Committee of the Third Session of the General Assembly, Doc. A/712 (Report of the Joint Second and Third Committee); General Assembly Resolution 208 (III) of 18 November 1948.

[2] Kelsen's comment (op. cit., at p. 820), which speaks of the provisional agenda only, is therefore not quite precise.

Security Council is subject to the same rules in both cases ('a vote of any seven members'). It is true that Article 109 (1) provides that the General Assembly and the Security Council shall fix the date and place of the Conference, while Article 109 (3) only speaks of the decision whether the Conference shall be held.[1] Paragraph 3, the *lex specialis*, regulates the particular case of the 1955 General Assembly. This special rule is supplemented by the general rules of paragraph 1 where paragraph 3 does not contain stipulations to the contrary. 'Such a conference' (para. 3) is a conference of which the General Assembly and the Security Council have jurisdiction to fix the date and place.[2] This does not, however, answer the question whether a simple majority, or a two-thirds majority, is required to fix the date and place of a paragraph 3 conference. 'Paragraph 3 failed to list the date and place as requiring a simple majority vote.'[3] It could be argued therefore that, the *lex specialis* (para. 3) being silent on the method of voting on date and place of the Conference, the *lex generalis* applied subsidiarily and this, paragraph 1, requires a two-thirds vote. The interpretation is preferable, however, that a simple majority is sufficient also to fix the date and the place of the Conference. If a simple majority only is required for the far more important question whether the Conference should be called at all, it seems to follow that the conditions for the fixing of the details of implementing the basic decision should not be more severe. Otherwise, the decision to call the Conference might be frustrated by the lack of a two-thirds majority for fixing its date and place.[4]

It is not provided in the Charter that the proposal to call a conference shall also be placed automatically on the agenda of the Security Council.[5] This means that, in theory, the Security Council is not bound to place the matter on its agenda even when the General Assembly has adopted a decision that the General Conference shall be called. The decision of the General Assembly to convene a General Conference will immediately be brought to the attention of the Security Council,[6] however, and in practice no problem is likely to arise. Under Article 28 (1) the Security Council shall be so organized as to be able to function continuously.

It has been claimed that the Charter contains no provision concerning the convocation of the first meeting of the General Conference and its organization and procedure, and that neither the General Assembly nor the

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[1] Kelsen, op. cit., pp. 821–2.

[2] On the question of the ratification of alterations recommended by a General Conference see *infra*, p. 85.

[3] Robinson, loc. cit., p. 318, n. 3.

[4] Robinson, loc. cit., p. 318, favours this view. He says: 'The General Assembly is absolutely sovereign to decide on this [the date and the place] at its own discretion probably by the same majority' [a simple majority]. The sovereign decision has, of course, to be taken jointly by the General Assembly and the Security Council.

[5] Kelsen, op. cit., p. 819.

[6] Rule 6 of the Provisional Rules of Procedure of the Security Council.

Security Council are authorized to decide by whom the first meeting of the Conference shall be summoned and who shall preside over it. It has been said, almost in the same breath, that the General Conference is not authorized to adopt its own rules of procedure either.[1] It is a fact, however, that two fundamental rules relating to the organization and procedure of the General Conference are expressly laid down in the Charter:

(1) Each Member of the United Nations shall have one vote in the Conference.
(2) A two-thirds majority is required for recommendations of alterations of the Charter.

Moreover, authority to make the General Conference capable of constituting itself and of proceeding to the review of the Charter 'arises by necessary intendment out of the Charter'.[2] It must be vested in someone, either in the General Assembly and the Security Council, or in the General Conference itself. There can hardly be any doubt that the General Conference has authority to do all that is 'necessary and proper for carrying into execution'[3] its powers under Article 109, and this includes the authority to adopt rules of procedure although no express provision to this effect is contained in the Charter.[4]

Article 62 (4) of the Charter provides that the Economic and Social Council, in accordance with the rules prescribed by the United Nations, may call international conferences on matters falling within its competence. Neither this provision, nor the rules prescribed by virtue of it by the General Assembly[5] are, of course, applicable to the General Conference convened for the purpose of reviewing the Charter. The review of the Charter does not fall within the competence of the Economic and Social Council. The General Conference is not convened by that Council, but by the General Assembly and the Security Council. The rules adopted under Article 62 (4) cannot be applied to the Charter Review Conference even by analogy.

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[1] Kelsen, op. cit., p. 822.

[2] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: *I.C.J. Reports, 1949*, p. 184. 'Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties' (ibid., p. 182). See also *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954: *I.C.J. Reports, 1954*, p. 57. '... the Court finds that the power to establish a tribunal ... was essential to ensure the efficient working of the Secretariat. ... Capacity to do this arises by necessary intendment out of the Charter.'

[3] Language borrowed from Article VIII (18) of the Constitution of the United States of America.

[4] The 'Interim Arrangements concluded by the Governments represented at the United Nations Conference on International Organisation', San Francisco, 26 June 1945, establishing the Preparatory Commission provided expressly that 'the Commission shall establish its own rules of procedure' (para. 2). They did not prescribe who was to preside over the first meeting of the Preparatory Commission, nor who was to preside over the first meeting of the General Assembly to be convoked under para. 4 (*a*) by the Preparatory Commission.

[5] Rules for the calling of international conferences of States, adopted by Resolution 366 (IV) of the General Assembly on 3 December 1949.

The question to what extent the General Assembly has jurisdiction to prepare the substantive work of the Review Conference came up for discussion at the eighth (1953) session of the General Assembly[1] in connexion with various proposals made in this regard.

VII

Ratification of amendments and alterations

Constitutional importance of the requirement of ratification

In providing that amendments or alterations of the Charter must be ratified, the Charter follows the precedents set in Article 26 of the Covenant of the League of Nations and in what is now Article 36 of the Constitution of the International Labour Organization. The requirement of ratification was inserted in the Covenant on the proposal of President Wilson, in place of a proposal of Lord Robert Cecil under which it would have been possible to alter the Constitution and the functions of the League by unanimous vote of the Executive Committee (Council) confirmed by a majority of the Assembly of Delegates (Assembly), a procedure similar to those which now apply to certain amendments to the constitutions of some specialized agencies. President Wilson's proposal, which became paragraph 1 of Article 26, was based on the consideration that a provision under which the League alone could have enacted an amendment of its basic instrument would have been contrary to various national constitutions, in particular the Constitution of the United States of America.[2] It has been said that the requirement of ratification was of great importance for the legal character of the Organization and that it proved that the League was not a 'super-government' or 'super-state'.[3] These arguments, it is submitted, hold good also in the case of the United Nations.

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[1] On the proceedings of the General Assembly see the Report of the Sixth Committee, Doc. A/2559, General Assembly Resolution 796 (VIII). See also Liang, 'Preparatory Work for a Possible Revision of the United Nations Charter', in *American Journal of International Law*, 48 (1954), pp. 83 ff., and Salah El Dine Tarafi, 'The Risk of Revision. Appraisal of United Nations Preparation for Charter Review', in *Annals of the American Academy of Political and Social Science*, 296 (1954), p. 140.

[2] Hunter Miller, *The Drafting of the Covenant* (1928), vol. i, pp. 203–4; Ray, *Commentaire du Pacte de la Société des Nations* (1930), p. 686. The substitution of President Wilson's proposal for Lord Robert Cecil's proposal, instead of its addition to it, led to the defect of Article 26 of the Covenant, already described, which consisted in the failure of the Covenant to regulate the procedure by which the text of the amendments was to be established by an organ of the League.

[3] Schücking and Wehberg, op. cit. (2nd ed.), p. 779. The learned authors were mistaken, however, in their statement that the requirement of ratification by Member States distinguished the League from a Federation (Federal State, *Bundesstaat*), where, they claimed, amendments of the Constitution take place in the form of federal legislation, i.e. without ratification. Amendments

Meaning of 'ratification'

In Articles 108 and 109 (2) of the Charter (as in Article 26 of the Covenant) the word 'ratified' is used in a sense which is somewhat wider than the term of art 'ratification' as traditionally applied in the law of treaties before the emergence of international organizations with quasi-legislative functions. 'Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives. . . .'[1] In a Report on the Law of Treaties[2] Professor Lauterpacht proposed to define ratification as an act by which a competent organ of a State formally approves as binding the treaty or the signature thereof. This wording was proposed 'in order to accommodate the eventual occurrence . . . of ratification of treaties which are not subject to signature (although even in these cases the signature is implied in most cases by the participation of the representative of the State in the drafting and adoption of the treaty by a conference or an organ of an international organization)'.[3] Certain problems arose in the League of Nations in connexion with the ratification of amendments adopted by the League Assembly. A number of States, among them France and Japan, voiced concern over the question whether their constitutions enabled them to ratify a decision that had not assumed treaty form. In order to allay these fears a practice was adopted whereby the Protocol, signed by the President of the Assembly and the Secretary-General, would also be opened to signature by the delegates.[4] This practice of the League has been subjected to cogent criticism.[5] Normally, the ratification of a treaty confirms the previous signature which the representative of a State has affixed to its text. No great difference appears to exist between this and the ratification of an amendment to the Charter for which the representative concerned has voted in the General Assembly or in the General Conference. The difficulty only arises when a State seeks to ratify an amendment which its representatives may have expressly opposed. The Charter as a whole, including Articles 108 and 109, and consequently the provisions relating to the ratification of 'adopted' or 'recommended', but not necessarily signed, amendments, has been ratified by the Member States 'in accordance with their respective constitutional processes' (Article 110). This, taken in conjunction with the development of the law of treaties as described by the learned Special Rapporteurs of the International Law Commission,[6] warrants the assumption that the difficulties which this

to the Constitution of the United States of America (and of some, though not all, other Federal States) were then, and are now, subject to ratification by a qualified majority of the constituent units ('States') (Article V of the Constitution of the United States).

[1] Oppenheim, *International Law*, vol. i (8th ed. by Lauterpacht), § 510.

[2] U.N. Doc. A/CN.4/63 of 24 March 1953, p. 67.

[3] Ibid., p. 70.

[4] Ray, op. cit., p. 696.

[5] Kopelmanas, op. cit., p. 131.

[6] See U.N. Docs. A/CN.4/54 (10 April 1952) and A/CN.4/63 (24 March 1953).

particular technicality caused in the League will not arise in the United Nations.

Mode of ratification of amendments adopted under Article 108, of alterations proposed under Article 109 (1), and of alterations proposed under Article 109 (3)

Article 108 leaves no doubt that amendments adopted by the General Assembly, in order to become effective, have to be ratified by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council. The language of Article 109 is equally clear at least as far as the ratification of alterations recommended by a General Conference convened under Article 109 (1) is concerned. The paragraph that follows Article 109 (1) provides unambiguously that any alteration of the Charter recommended by a two-thirds vote of the Conference shall take effect when ratified by two-thirds of the Members of the United Nations including the Big Five. 'Had the relative positions of the paragraphs (of Article 109) been changed to 1, 3, 2, there would have been no doubt as to the applicability of paragraph 2 to the two procedures'[1] of paragraphs 1 and 3, i.e. irrespective of whether the Conference in question is one convened by a two-thirds vote of the General Assembly (para. 1) or by a simple majority vote (para. 3). It has been argued that as things stand now the Charter contains no provision as to how and by whom alterations recommended by a General Conference convened under Article 109 (3)[2] shall be ratified. The theory that the ratification provision of paragraph 2 does not apply to the procedure of paragraph 3, it has been said, receives support from 'the fact that the procedure for the convocation of a conference under paragraph 3 is more relaxed than under paragraph 1 and it might have been expected that a less difficult method of "coming into force" would be logical'.[3] The present writer respectfully agrees with Dr. Robinson's opinion that 'despite these difficulties there would appear justification in extending the provisions of paragraph 2, also to paragraph 3',[4] i.e. with the proposition that however and whenever a General Conference is convened, its recommendations are subject to ratification by two-thirds of the Members of the Organization including the Big Five. This interpretation is consistent both with the text and with the history of Article 109.

As far as the text is concerned, it may be admitted that a higher measure of legislative elegance would have been achieved if the order 1, 3, 2 of the three paragraphs of Article 109 had been chosen. Logic would have demanded that provision be made first for the two variations of the procedure for calling the General Conference and for the voting in the Conference and then only for that stage of the amending process which follows upon the establishment of the text by the Conference. No far-reaching conclusions, however, can be drawn from the fact that the San Francisco Conference, working under heavy pressure of time and being interested in producing an acceptable compromise of a very delicate controversy, did not live up to the highest standards of draftsmanship. The text is fairly clear as it stands. Paragraph 2 speaks of alterations recommended by a two-thirds vote of 'the conference'. By 'the conference' is meant both a conference convened under paragraph 1, and a conference convened under paragraph 3. 'If such a conference has not been held', says paragraph 3, 'the proposal to call such a conference shall be placed on the agenda of the tenth session of the General Assembly'. 'And the conference', paragraph 3 concludes, 'shall be held if so decided', &c. 'The conference' is a specific instance of 'such a conference' and, where paragraph 3 does not provide differently, the rules of paragraphs 1 and 2 apply to it and to the result of the work undertaken by virtue of it.

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[1] Robinson, loc. cit., p. 318.

[2] See the statement by Mr. Rivera Reyes (Panama) in the 372nd meeting of the Sixth Committee, para. 28, 20 October 1953, that 'whereas Article 109, paragraph 2, explicitly stated in what manner any amendments arrived at by a General Conference called under paragraph 1 were to be adopted, no provision was made for the adoption of amendments proposed by a General Conference convened under paragraph 3'.

[3] Robinson, loc. cit., p. 319.

[4] Ibid.

Any doubt that may exist on this score is dispelled by the *travaux préparatoires*. Committee I/2, from whose deliberations the present Article 109 emerged, had originally before it the Memorandum of its sub-committee[1] which had decided by a narrow majority (7 to 5) to recommend the following provision: 'Any alterations of the Charter recommended by a two-thirds vote of the Conference shall take effect when ratified in accordance with their respective constitutional processes by the Members of the Organisation having permanent membership on the Security Council and by a majority of the other Members of the Organisation.'[2] When the sub-committee drew up this text, it contemplated only one procedure for calling a review conference. In the course of the examination of the proposals of the sub-committee in the full Committee, the United States proposed the insertion of a provision which introduced the second method for calling the Conference 'if such a general conference has not been held before the tenth annual meeting of the Assembly . . .', i.e. the provision which eventually became Article 109 (3).[3] At a later meeting of Committee I/2, when the texts providing for the two different convocation methods were before it, the delegate of Australia urged[4] the Committee to accept the motion of the Mexican delegation (which had previously been made and defeated in the sub-committee)[5] that no provisions be included in the Charter on the voting procedure to be followed at the Special Conference *or on the ratification of amendments proposed by the Conference.*[1] He declared that the procedure for the ratification of amendments proposed by the Conference should be left to the good sense and wisdom of the members of that Conference. The original sponsor of the proposal that the decision on ratification requirements should be left to the Conference pointed out, however, that the sub-committee had taken cognizance of the declaration of the sponsoring Governments and France to the effect that they were not able to consent to a procedure by which the Special Conference would be able to decide that amendments adopted by it should come into force without the unanimous consent of the permanent members of the Security Council. He asked whether the sponsoring Governments and France maintained this declaration in its entirety.[2] When the sponsoring Governments and France, through the delegate of the United States, answered this question in the affirmative, the delegate of Mexico stated that he was prepared to withdraw his proposal. He then went on to explain his view as to the substance of the problem, namely, that amendments should require ratification by all the permanent members of the Security Council.[3] The delegate of Belgium even contended that the withdrawn Mexican proposal was contrary to the principles of international law. He said it would be politically impracticable to demand that the sponsoring Governments accept the removal of the veto from the amending process.[4] In a later meeting, the delegate of Australia reminded the Committee of the position he had taken against the requirement of unanimity of the permanent members.[5] The delegate of New Zealand insisted that it was particularly objectionable that the principle of the veto should be given permanent status by incorporating it in the amending process.[6] In his view, it would be preferable if the Committee agreed on a text which would expressly leave open the question of how amendments by the Special Conference would take effect. Neither he nor the Australian delegate, however, made a formal proposal to this effect. The Canadian delegate pointed out that the concession asked of the sponsoring Governments with respect to the procedure of amendment by the Special Conference was not that they give up the veto; it was merely that the question be left open until the Conference should meet. He inquired whether the permanent members regarded even this proposal as unacceptable, and when the United States delegate replied that as far as his country was concerned the language of the sponsoring Governments' amendment was essential, the delegate of Canada stated that in that case his delegation would not offer any further opposition, but would abstain on that question.[7]

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[1] 7 U.N.C.I.O., p. 565.

[2] Ibid., pp. 566–7.

[3] Ibid., p. 220.

[4] Ibid., pp. 229–30.

[5] Ibid., p. 469, para. 40, and p. 566.

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[1] 7 U.N.C.I.O., p. 229. Italics supplied.

[2] Ibid., p. 236 (corrigendum to p. 230).

[3] Ibid., pp. 236–7.

[4] Ibid., p. 231.

[5] Ibid., p. 241.

[6] Ibid., p. 243.

[7] Ibid.

Replying to an Indian suggestion that no amendment provision should be inserted in the Charter, the delegate of the United Kingdom said that, as to the requirement of unanimity of the permanent members of the Security Council, he thought the arguments on both sides were reasonable, but inasmuch as the permanent members would have the greater responsibility their view that unanimity would be as important in five or ten years as it was at the time of the discussion should be given the greater weight.[1] After several other interventions both in favour of and against the Big Power veto on alterations, the Committee adopted the text proposed by the sponsoring Governments (as modified by a Belgian amendment not relevant to the present argument). This provides for ratification by two-thirds of the Members, including the permanent members of the Security Council.

The legislative history of Article 109 shows, therefore, that there was no alternative proposal for the Committee to vote upon after the Mexican amendment was withdrawn. The only provision on which an affirmative vote was recorded was that which is now paragraph 2, stipulating for ratification by two-thirds of the Members and the unanimity of the five Great Powers. The vote concerned both methods which are now laid down in paragraphs 1 and 3, and nobody suggested a separate procedure or a separate vote on either.

'*In accordance with their constitutional processes*'

The ratification of an amendment by the Member States must take place 'in accordance with their respective constitutional processes'. Of this provision it has been said that it was 'a bow in the direction of popular government', but that it was not altogether clear what practical effect it had.[2] It corresponded to Article 110, which provided in similar terms for the ratification of the Charter itself. Article 110 further provided that the ratifications (of the Charter) were to be deposited with the Government of the United States of America, and from this one writer[3] draws the inference that the United States Government, acting in the service of the Organization, was not to accept the deposit of a ratification unless the latter was in conformity with Article 110 (1) and, consequently, that it was for that Government to decide on behalf of the Organization whether or not the ratification fulfilled the requirements of that provision whenever this question became doubtful. This, however, was not done. The ratifications were simply accepted as they were.[4] The ratifications were made at a time—in the autumn of 1945—when many constitutional systems throughout the world were in an unstable condition or in a state of flux. On behalf of

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[1] 7 U.N.C.I.O., pp. 242–3. It will be noted that the United Kingdom delegate expressly mentioned the ten-year period.

[2] Wilcox, loc. cit., p. 2.

[3] Kelsen, op. cit., p. 58.

[4] Ross, op. cit., p. 29.

France and Czechoslovakia, the Charter was ratified by provisional authorities.[1]

The Charter contains no provision on the question of where instruments of ratification of amendments shall be deposited. From this it has been argued that even if Member Governments were to deposit the instruments of ratification with the Secretary-General, the latter would have no authority to decide whether a ratification of an amendment is constitutional or not. 'Since no other organ of the United Nations is directly or indirectly authorized to make such a decision, only the Government of the ratifying State is competent in this respect.'[2] If this interpretation is correct, then the provisions of Articles 108 and 109 (2), which stipulate for ratification 'in accordance with [their] constitutional processes', would have the same status as Article 110 (1), of which it has been said that 'il pourrait être réputé non écrit'.[3] In the circumstances, this interpretation probably provides the best solution. Once the question of the constitutionality of ratifications of Charter amendments is laid open to international investigation the whole edifice of the Charter, with or without amendments, might be thrown into confusion. The validity of an important amendment to the Charter would depend on the interpretation of controversial points in the national constitutions of one or several States, and the validity of these ratifications under the 'respective constitutional processes' concerned would determine whether a sufficient number of ratifications has taken place to put the amendment into effect for all the Member States. The same undesirable situation may, of course, result whenever a ratifying State later challenges the constitutionality of its ratification.[4]

Ratification by all the permanent members of the Security Council

The Charter requires that 'amendments' (Article 108) or 'alterations' (Article 109) be ratified by two-thirds of the Members of the United Nations including *all* the permanent members of the Security Council. The word 'all' is important. The wording should be compared with that of the English version of Article 27 (3) of the Charter, which is the provision embodying the principle of unanimity among the permanent members of the Security Council 'on all other matters' (other than procedural ones) and which requires that decisions 'shall be made by an affirmative vote of seven members including the concurring votes of the permanent members', not 'of *all* the permanent members'. The French text of Article 27 (3), however, says 'Les décisions . . . sont prises par un vote affirmatif de sept de ses membres dans lequel sont comprises les voix de

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[1] Kopelmanas, op. cit., p. 122.

[2] Kelsen, op. cit., p. 823.

[3] Kopelmanas, op. cit., p. 124.

[4] Difficulties of this character arose in the League of Nations with regard to the membership of the Argentine and of Luxembourg. See Kopelmanas, op. cit., p. 124, nn. 1 and 2.

tous les membres permanents . . .'. While Article 27 (3) has been applied in the sense that abstention is not a veto, such an interpretation is hardly possible in the ratification phase of the amending process. There, abstention, passive behaviour, non-action, the mere non-ratification by a permanent member of the Security Council, *is* a veto. Another way of expressing the same idea is to say that a veto would not be necessary since a simple abstention (by a Great Power) would suffice to defeat an amendment,[1] or that agreement by silence or lack of objection is excluded.[2]

Effect of change in membership

The requirement of ratification by two-thirds of the members raises a further legal problem in the event of a change in membership of the Organization which takes place after the adoption of an amendment by the Assembly (or the recommendation of an alteration by the General Conference), but before two-thirds of the States Members have ratified. Should the computation be based on the number of Members at the time of voting or at the time when the amendment comes into force? It has been suggested that the more logical course would be to take as a basis the number of Members at the time the amendment takes effect, since it will actually affect these Members. On the other hand, it has been claimed that this procedure would complicate the computation of the majority. Each of the suggested solutions has its defects and its advantages. The suggestion has been made, therefore, that the point should be settled beforehand, since any uncertainty as to the actual number of requisite ratifications would involve the risk of exposing the amendments to subsequent challenges of their validity.[3] It is doubtful whether this course is practicable. It would involve an authentic interpretation of the Charter by whichever body proceeds 'to settle the question beforehand', i.e. by the General Assembly (in the case of Article 108) or the General Conference (in the case of Article 109). Such authority, however, has not been conferred upon them by the Charter.

The question of a time-limit for ratification

No date is set in Articles 108 and 109 for the ratification of amendments or alterations. Long periods of uncertainty as to the fate of amendments adopted by the General Assembly or recommended by the General Conference may therefore ensue. Doubt has been expressed by learned writers[4] and in the General Assembly[5] as to the right of the General Assembly or the General Conference to reduce such periods of uncertainty by setting definite time-limits for ratifications such that on their expiration the amendment or alteration concerned would no longer be open for ratification and would lapse.

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[1] Professor Spiropoulos (Greece), Doc. A/C.6/SR.375, para. 6.

[2] Robinson, loc. cit., p. 319.

[3] Kopelmanas, op. cit., p. 133.

[4] Kelsen, op. cit., p. 822; Robinson, loc. cit., p. 319.

[5] Statement by Mr. Robinson as representative of Israel in the Legal Committee of the Eighth (1953) Session of the General Assembly, Doc. A/C.6/SR.375, para. 35.

In the present writer's opinion, it is possible for the General Assembly or the General Conference to provide, as a substantive part of a proposed amendment, that the amendment will come into force only if it is ratified in accordance with Articles 108 or 109 within a given period. If the 'amending power' of the United Nations, i.e. the General Assembly or the General Conference plus the ratifying authorities of two-thirds of the Member States, including the permanent members of the Security Council, has the capacity to amend—or, for that matter, not to amend—the Charter, there is no reason why it should not have the capacity to decide upon conditional Charter amendments. In making a determination of this kind, in providing that an amendment shall come into force only if ratified within a certain reasonable time, the General Assembly, or the General Conference, would not interfere with the rights of Member States or impose upon them new obligations. It would, on the contrary, make any change in the legal position of States dependent on an additional condition. It would protect both Member States and the Organization against the contingency that an amendment to the defeat of which they had already adjusted themselves, might be revived and put into effect through ratification by what, at the time, might be a minority of Members, such ratification taking place under entirely changed circumstances in which the amendment would no longer be acceptable to the majority, though they might have ratified it a long time, even generations, ago.

In 1921 the League of Nations considered a time limit of twenty-two months appropriate and a period of two years too long. The experience showed that the statesmen of 1921 had been too optimistic. It took three to five years before the minor amendments to the Covenant of the League adopted in 1921 received the necessary ratifications. The 1922 Amendment to the Constitution of the International Labour Organization did not come into force until twelve years later, and the Protocol concerning the Revision of the Statute of the Permanent Court of International Justice of 1929 entered into force in 1936. The amendments to the Constitution of the I.L.O. of 1945, 1946, and 1953, on the other hand, came into force comparatively soon after their adoption by the International Labour Conference.

The time at which amendments enter into force

Both Articles 108 and 109 (2) provide that amendments or alterations shall take effect '*when ratified*' by the required number of Member States. These provisions differ from Article 110 (3), under which the Charter itself came into force *upon the deposit of ratifications* by the Big Five and by a majority of the other signatory States. For the entering into force of amendments, the deposit of instruments of ratification is not required, provided the necessary ratifications have taken place. Hence, as in the case of the Statute of the Permanent Court of International Justice of 1920,[1] some difficulty may be encountered in determining the precise date on which an amendment to the Charter comes into force. This will be the moment of the performance of the last required ratification by the competent constitutional authority of the State concerned, not the moment of the depositing of the instrument of ratification.

The question arises, in this connexion, whether the General Assembly in the procedure under Article 108, or the General Conference in the procedure under Article 109, has authority to fix the time of an amendment's entering into force either absolutely, by naming a certain calendar day, or relatively, by stipulating that the amendment shall come into force, say, one or two years after the making, or the deposit, of the last required instrument of ratification. The wording of the Charter seems to exclude such a possibility since it fixes the time by the words 'when ratified . . .'. Such literal construction, however, would seem to be less satisfactory than a more liberal interpretation, which, moreover, would be supported by general principles of law recognized by civilized nations. We can surely include among these general principles the rule that the legislator has authority to lay down a *vacatio legis*; it is only with regard to the opposite phenomenon, namely, retroactive legislation, that constitutions or constitutional conventions sometimes restrict the discretion of a national legislature. As in the case of the setting of a time-limit for ratifications, it may be argued here that by enacting a *vacatio legis* the amending power would not add to the obligations of Member States but, on the contrary, would facilitate their adjustment to an amendment of the Charter where such adjustment were needed.

Ratification without legal effect if amendment does not come into force

If an amendment is not ratified by two-thirds of the Members of the United Nations, including the five permanent members of the Security Council, the ratifications which have actually been made are without legal effect. They do not, in that case, create legal obligations of the ratifying States *inter se*. It is not an international treaty that is being ratified, but a decision or recommendation of the General Assembly or the General Conference, and the ratifications can effect a modification of the Charter only when the required number have been made.[2]

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[1] Hudson, *The Permanent Court of International Justice, 1920–1942*, pp. 127–8.

[2] Of the same opinion, with regard to the Covenant of the League of Nations, are Schücking and Wehberg, op. cit. (2nd. ed.), p. 780.

It has been claimed, however, that even unratified amendments to the constitution of an international organization have considerable weight, although not in law. In 1921 the Assembly of the League of Nations adopted a series of amendments to the sanctions Article (Article 16) of the Covenant, the purpose of some of which was 'to relax the rigid and urgent obligations of the Covenant' by providing 'that sanctions should be applied not with violent and immediate completeness but gradually and partially'.[1] In adopting the amendments the Assembly stated that pending their ratification they should constitute 'rules for guidance which the Assembly recommends as a provisional measure, to the Council and to the Members of the League, in connection with the application of Article 16'. These amendments never came into force. In the Ethiopian crisis, in 1935, they were nevertheless taken as guiding directives in the application of economic sanctions against Italy. The representative of Cuba[2] gave expression to a similar line of thought in the Legal Committee of the 1953 General Assembly. After saying that it was possible to conceive of amendments which would be readily acceptable to all the permanent members of the Security Council, he added that amendments which were accepted by a two-thirds majority, but not by all the permanent members, would, though not effective, still have great moral weight and would constitute an important contribution to the interpretation and application of the Charter.

The question of reservations

The view has been expressed that 'from a technical point of view it must be regarded as a defect that Articles 108 and 109 do not contain rules concerning . . . the right of ratification with reservation'.[3] It may be asked whether this criticism of the Charter is fully justified. Though a close examination of the involved question of reservations to multilateral conventions is outside the scope of the present article, the following remarks may perhaps be pertinent: The problem has occupied the General Assembly at two sessions (the fifth and the sixth).[4] It was referred to the International Law Commission.[5] It was the object of an Advisory Opinion of the International Court of Justice rendered by a majority decision of seven judges, with dissenting opinions by five judges.[1] In his report on reservations to multilateral conventions, the Secretary-General recorded two instances of reservations to constitutions of specialized agencies, namely, the World Health Organization and the International Refugee Organization.[2] In November 1953 the Government of the Union of Soviet Socialist Republics informed the Director-General of the International Labour Office that it had decided to accept the obligations of the Constitution of the International Labour Organization, i.e. to become a member of that specialized agency, but indicated that the Soviet Union would not consider itself bound by the provisions of paragraphs 1 and 2 of Article 37, which deal with the settlement of disputes. The Director-General replied that 'the Constitution makes no provision for membership on the basis of incomplete acceptance of obligations' and that 'the Government of the U.S.S.R. may wish to consider the desirability of giving the matter further consideration'. In April 1954 the Government of the U.S.S.R. accepted the obligations of the Constitution of the I.L.O. without reservation.[3]

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[1] See Walters, *A History of the League of Nations*, p. 148; 'Protocols of Amendments to Article 16 of the Covenant of the League of Nations', adopted by the Second Assembly of the League of Nations, 4 October 1921, Cmd. Treaty Series, No. 32 (1924). One of the amendments was replaced by an amendment adopted in substitution by the Fifth Assembly on 27 September 1924.

[2] Mr. Garcia Amador, in Doc. A/C.6/SR.374, para. 2.

[3] Ross, op. cit., pp. 39–40. See also Kopelmanas, op. cit., p. 114, on the possibility of ratifying the Charter itself with reservations.

[4] Resolutions 478 (V) of 16 November 1950 and 598 (VI) of 12 January 1952.

[5] Report of the International Law Commission on the work of its third session (1951), Doc. A/1858, Chapter II.

It is submitted that the Charter, although it contains no express provision to this effect, does not admit of reservations by unilateral declaration. No reservation was made on signature or ratification of the Charter by any Government although at San Francisco certain delegations did reserve their position on certain texts which a committee of the Conference was considering.[4] When Article 2 (5) of the Charter was drafted at San Francisco,[5] an amendment denying to any Member the right to claim exemption from the provisions of this paragraph on the ground of its status of permanent neutrality was considered unnecessary since the intended effect was implied in the principles embodied in this paragraph.[6] In the Advisory Opinion on *Reservations to the Genocide Convention*, which does not contain a provision on reservations, the International Court of Justice held that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention.[1] This conclusion was based, *inter alia*, on the character of the Convention, its purpose and its mode of adoption, from which, in the opinion of the Court, it could be established that the parties intended to admit the faculty to make reservation.[2] No such intention can be shown to exist in the case of the Charter and in the absence of such intention the principle that reservations compatible with the object and purpose of the treaty are admissible cannot be extended to the Charter. In the absence of an express stipulation in the amendment to the contrary, what applies to the Charter also applies to Charter amendments. The General Assembly or the General Conference, of course, have power to provide expressly for the admissibility of reservations to any or all amendments which might be adopted. As a matter of fact, the General Assembly has recommended[3] 'that organs of the United Nations, specialized agencies and States should in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them'. The International Law Commission[4] has suggested that in some cases it may be desirable that the text of a convention exclude all possibility of reservations and has added that this was particularly desirable in the case of international constitutional instruments. The question of amendments to the Charter poses an additional problem in this regard: if ratified by two-thirds of the Members, including all the permanent members of the Security Council, amendments to the Charter come into force for all Members of the United Nations, including those which have expressed their opposition thereto by voting against them in the General Assembly or in the General Conference. It is difficult to imagine a workable rule which admits of reservations and which could be elaborated without throwing into confusion the whole structure of the Charter.[5]

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[1] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion: *I.C.J. Reports, 1951*, p. 15.

[2] A/1372 of 20 September 1950, paras. 12 and 13. The United States 'understanding' relating to the Constitution of W.H.O. has been summarized *supra*, at p. 58. The reservations to the Constitution of I.R.O. are described by Schachter, loc. cit., pp. 126–7, and Liang, loc. cit., pp. 120–2 (see *supra*, p. 59, n. 1).

[3] United Nations Press Releases ILO/746, 750 and 794 of 6 and 16 November 1953 and 27 April 1954.

[4] Argentina and Guatemala in Committee 4 (Trusteeship system) of Commission II, Docs. 552, 580 and 1143, summary reports of the 9th, 10th and 16th meetings of Committee II/4.

[5] 'All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.'

[6] U.N.C.I.O. Documents: Report of Rapporteur of Sub-Committee I/1/A to Committee I/1, Doc. 739, vol. 6, p. 722, and Report of the Rapporteur of Committee I to Commission I, Doc. 945, vol. 6, p. 459–60. See also Goodrich and Hambro, op. cit., p. 108, and Kelsen, op. cit., p. 94.

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[1] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion: *I.C.J. Reports, 1951*, p. 29.

[2] *I.C.J. Reports, 1951*, at p. 24.

[3] General Assembly Resolution 598 (VI) of 12 January 1952.

[4] Report of the International Law Commission on the work of its third session (1951), Doc. A/1858, para. 27.

[5] See Joint Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo to the Advisory Opinion on *Reservations to the Genocide Convention*, loc. cit., pp. 44 ff.

THE PLEA OF DOMESTIC JURISDICTION BEFORE INTERNATIONAL LEGAL TRIBUNALS

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1. MUCH has been written concerning the effect of the reservations of matters of domestic jurisdiction in Article 15 (8) of the Covenant and Article 2 (7) of the Charter as limitations upon the political jurisdiction respectively of the League of Nations and United Nations.[1] The object of the present article is to examine a particular aspect of the problem, which has not perhaps received as much attention, namely, the plea of domestic jurisdiction as a bar to the contentious jurisdiction of international legal tribunals.

2. The advisory jurisdiction of the International Court of Justice is directly derived from the political jurisdiction of the United Nations as formerly was that of its predecessor from the political jurisdiction of the League. It is not therefore proposed to embark on a general examination of the plea of domestic jurisdiction in cases under the Court's advisory jurisdiction. To do so would inevitably bring in the whole problem of the reserved domain in relation to the jurisdiction of political organs, which is beyond the scope of the present paper. Reference will be made to Advisory Opinions only to the extent that they throw light on the operation of the plea of domestic jurisdiction in contentious cases. In point of fact, the principal Advisory Opinion dealing with domestic jurisdiction, the famous Opinion on the *Nationality Decrees in Tunis and Morocco*,[2] although in form an Advisory Opinion, was in substance a preliminary objection to jurisdiction in a contentious case for reasons which will be explained hereafter. Consequently, this Opinion, quite apart from the general significance of its pronouncements on the meaning of the reserved domain, is of particular interest in the present connexion and will require detailed investigation.[3]

The general doctrine of the reserved domain of matters of domestic jurisdiction

3. The Institute of International Law at its 1954 Session adopted by a very large majority the following definition of the reserved domain:[4]

> 'The "reserved domain" is the domain of State activities where the jurisdiction of the State is not bound [*liée* in the French text] by International Law.

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[1] See, for example, Politis in *Recueil des Cours* of the Hague Academy of International Law, 6 (1925), pp. 43–76; Bourquin, ibid. 35 (1931), pp. 146–55; Basdevant, ibid. 58 (1936), pp. 603–613; Preuss, ibid. 74 (1949), pp. 553–650; Rolin, ibid. 77 (1950), pp. 377–93; Brierly in this *Year Book*, 6 (1925), pp. 8–19; Jones in *Illinois Law Review*, 46 (1951), pp. 219–72; Fincham, *Domestic Jurisdiction* (1948); Lauterpacht, *International Law and Human Rights* (1950), pp. 166–200. The Institute of International Law has completed a valuable study of the general problem of the reserved domain of domestic jurisdiction: see *Annuaire de l'Institut de Droit International*, 43 (1950), Part 1, pp. 5–41; 44 (1952), Part 1, pp. 137–80; 45 (1954), Part 2, pp. 108–99.

[2] (1923), *P.C.I.J.*, Series B, No. 4.

[3] See *infra*, pp. 107–8.

[4] *Annuaire*, 45 (1954), Part 2, pp. 150 and 299.

> 'The extent of this domain depends on International Law and varies according to its development.'

Clearly, this definition is founded upon the exposition of the reserved domain of domestic jurisdiction which was given by the Court in its Opinion on the *Nationality Decrees in Tunis and Morocco*.[1] It represents what was referred to in the discussions at the Institute[2] as the classical meaning of the reserved domain. The Institute, while adopting in Article 1 of its Resolutions the above definition as the correct statement of the general concept of the reserved domain of domestic jurisdiction, recognized that the reserved domain might be formulated in different terms in particular instruments to define the limits of the jurisdiction of particular international organizations. In Article 2 of its Resolutions it registered the view that the formula, 'matters which are *essentially* within the domestic jurisdiction of States', which is found in Article 2 (7) of the Charter, is to be regarded as such an exceptional formulation of the reserved domain and as therefore relevant only to the jurisdiction of the particular international organizations concerned. What, if any, is the difference in content between the reserved domain of Article 2 (7) of the Charter and the reserved domain under the classical doctrine, the Institute did not attempt to say. But its general propositions in Articles 1 and 2 of its 1954 Resolutions are believed to place the problem of the reserved domain of domestic jurisdiction in proper perspective.

4. The reserved domain of matters of domestic jurisdiction thus, in principle, comprises those activities which at any given moment are left by international law within the uncontrolled discretion of the State concerned. From one aspect, matters of domestic jurisdiction are those activities which, at the given moment, international law leaves to the exclusive jurisdiction of the State in question. From another aspect, matters of domestic jurisdiction are those activities in regard to which, at the given moment, international law does not subject the State in question to any international obligation *vis-à-vis* a State or international organization. In its first aspect, the doctrine of the reserved domain appears as a constitutional doctrine distinguishing between matters within international jurisdiction and matters exclusively within State jurisdiction. In its second aspect, the doctrine is concerned with the substantive obligations of States under international law; in this aspect it simply affirms that the range of a State's obligations is prescribed by the rules of international law applicable at the time and that outside that prescribed range a State is not answerable internationally for its conduct. It follows that a plea of domestic jurisdiction may either appear as an objection to the competence of a State, international organization or international tribunal to examine into the matter at all or

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[1] See *infra*, p. 107.

[2] By Spiropoulos: *Annuaire*, 45 (1954), Part 2, p. 155.

may appear as an objection to the validity of an international claim on the ground that the claim does not disclose any breach of an obligation owed to the claimant under international law.

5. Some of the difficulty which surrounds the doctrine of domestic jurisdiction is due to its dual character as a doctrine concerned both with the boundary between international and State jurisdiction and with the substantive rights and obligations of States under international law. Even in a Federal system the constitutional rules determining the jurisdictional powers of the units of the Federation may have this dual character, though the jurisdictional aspect is normally uppermost. In the loose, decentralized international system, where the existence of a jurisdiction superior to that of the individual State is the exception rather than the rule, the constitutional question of the reserved domain of State jurisdiction tends to be submerged in the substantive question of the State's obligations under international law. When the issue is simply one between two States without possibility of compulsory recourse to an independent tribunal, the doctrine of the reserved domain is not infrequently invoked by the defendant State as a bar to the intervention of the claimant State in the defendant's affairs. But, the two States being alone and face to face, it really makes little difference whether the question 'within or not within the reserved domain' is regarded as a question going to the defendant State's powers of jurisdiction or to its rights or obligations *vis-à-vis* the claimant State under international law. It was, no doubt, primarily for this reason that in the classical system of international law before the League of Nations, although there is ample evidence of the recognition of a reserved domain—especially in the law concerning intervention—its significance as a constitutional limit upon international jurisdiction was not much emphasized. When the litigating States themselves constitute the tribunal, the question of the reserved domain is bound to appear more as one of substantive rights and obligations under international law than as one of jurisdiction. But, even when there exists an independent tribunal, the jurisdiction of which is invoked by one of the parties to a dispute, the intimate connexion between the question of jurisdiction and the question of substantive rights and obligations under international law is in no way diminished. Consequently, on a plea of domestic jurisdiction being lodged as an objection to its jurisdiction, the tribunal is necessarily confronted with a point which relates to the substantive rights of the parties under international law as well as to its own competence in the case. The problem for the tribunal is then how to reach a decision as to its own competence in the case without in fact examining into the rights of the parties on the merits and thus in some degree exercising the very jurisdiction which is disputed.[1]

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[1] See *infra*, p. 108.

6. In considering the reserved domain in relation to the jurisdiction of international tribunals or organizations it is necessary to keep in mind that the constitutional basis of their jurisdiction is the will of the parties to the dispute. No principle of the reserved domain is more firmly established than—in the words of the Permanent Court[1]—the rule that:

> 'No State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration or to any other kind of pacific settlement.'

On the other hand, once States have consented to the exercise of jurisdiction by a particular tribunal in regard to a specified category of disputes, their consent operates as an effective grant of jurisdiction to the tribunal concerned in accordance with the terms in which that consent was expressed. Their discretionary—reserved—power in regard to the submission of the disputes to international jurisdiction has become a tied power with respect to that tribunal and that category of disputes. They cannot afterwards object to the exercise of jurisdiction by that tribunal over that category of disputes except under the terms of the original grant of jurisdiction. Accordingly, a plea to jurisdiction on the ground of the reserved domain must always be based on an express or implied reservation of matters of domestic jurisdiction in the instrument (or instruments) on which the plaintiff State claims to found the tribunal's jurisdiction. If the terms of the instrument, according to their ordinary meaning, cover the particular matters in dispute, it is not open to the defendant State to object to jurisdiction by pleading domestic jurisdiction. The defendant State, however, has only bound itself as to submission to jurisdiction and remains free to raise any aspect of the reserved domain as a substantive defence at the hearing on the merits. It follows that, when the jurisdictional instrument does contain an express or implied reservation of matters of domestic jurisdiction, the defendant State may raise the issue of the reserved domain both as an objection to jurisdiction and as a substantive defence on the merits.

The plea of domestic jurisdiction in international law before the League of Nations

7. Under the completely decentralized constitution of the international community before the establishment of the League of Nations the jurisdictional aspect of the doctrine of the reserved domain was of comparatively little significance. 'International jurisdiction' in most instances consisted simply of diplomatic exchanges between the States concerned, in which each State was a judge in its own case. Consequently, as already mentioned,[2] an invocation by one of the States of the doctrine of the reserved

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[1] *Status of Eastern Carelia* (1923), Series B, No. 5, p. 27.

[2] See *supra*, p. 98.

domain tended to appear more as an argument against the admissibility of its opponent's claim than as a jurisdictional plea.

8. Arbitration, it is true, was beginning to develop as a more or less regular institution of international law. But, for the most part, States did not commit themselves in advance to submit their disputes to arbitration, or, if they did in a treaty of arbitration, they added reservations which left them free, when a dispute arose, to arbitrate or decline arbitration as they thought fit.[1] The majority of general treaties of arbitration dating from before the establishment of the League contained a reservation excluding from the obligation to arbitrate any questions affecting 'vital interests, independence and honour' or some similar reservation.[2] A reservation in such terms was broad enough to cover matters of domestic jurisdiction and it was, in addition, admitted that the decision whether a particular question did or did not fall within the reservation was not a matter for the tribunal but for the State which had made the reservation.[3] In short, a State wishing to avoid arbitral proceedings in regard to a particular question on the ground that the dispute concerned matters within its domestic jurisdiction, could simply invoke the reservation of 'vital interests, etc.' and refuse to arbitrate, without relying specially on a reserved domain of matters of domestic jurisdiction.

9. Nevertheless, the doctrine of the reserved domain did make some appearance in the jurisprudence of arbitral tribunals in connexion with claims for injuries to aliens. A number of the early treaties of arbitration were concluded specifically for the settlement of claims for injuries suffered by nationals of one of the contracting States for which the other State was alleged to be responsible.[4] In cases brought under these treaties the defendant State not infrequently invoked the local remedies rule, under which an alien has to exhaust the local remedies of the territorial State before his own State is entitled to bring an international claim. The particular *motif* of this rule is to protect against outside intervention the right of the territorial State to apply its own municipal laws and jurisdiction to all persons within its boundaries. Prima facie, therefore, the local remedies rule is specially connected with the limits of international jurisdiction in regard to the treatment of aliens. On the other hand, the question at issue being the right or otherwise of the alien's State to bring an international claim,

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[1] Cf. the observations of Von Bieberstein, the German delegate at the Hague Peace Conference of 1907, to the effect that treaties of arbitration were obligatory as long as there was no dispute but became optional as soon as one arose: *Actes et Documents* (1909), ii, pp. 51 and 53.

[2] See Wilson in *American Journal of International Law*, 23 (1929), pp. 68–93.

[3] See Politis in *Recueil des Cours*, 6 (1925), p. 51; Lauterpacht in *Economica*, 10 (1930), pp. 151–2.

[4] E.g., United States–Mexican Claims Conventions of 1839 and 1868 and similar conventions concluded by the United States with numerous other countries: see Moore, *International Arbitrations* (1898), vol. 3, pp. 2133 ff.

the local remedies rule is, in fact, as much concerned with the substantive rights of the parties as with international jurisdiction. At any rate that is how the local remedies rule was usually regarded in arbitral cases before the Covenant, as indeed it has been in more recent cases. In a few instances, for example in the *Clavel* and *Nolan* cases,[1] the tribunal, when accepting the plea, treated the alien's failure to exhaust local remedies as a matter going to the tribunal's jurisdiction. In the majority of cases, however, the tribunal treated the failure to exhaust local remedies as a matter of defence on the merits, for example in the *Leichart*, *Burn*, *Slocum*, and *Pratt* cases.[2] The predominant practice thus was to treat a failure to exhaust local remedies as a ground for dismissing the claim either summarily or after full hearing on the merits rather than as a bar to jurisdiction precluding any pronouncement on the merits. The predominant practice was clearly correct because the local remedies rule, although it may have the look of a jurisdictional rule, is undoubtedly a substantive rule concerned with the rights and obligations of the interested States *inter se* under international law. This is not to lose sight of the fact that there may really be two branches of the local remedies rule one of which is more procedural than the other. In some cases failure by the alien to have recourse to available local remedies excludes any question of an international liability on the part of the territorial State for denial of justice. In other cases, where a breach of an international obligation has been committed in regard to an alien by the territorial State, independently of any denial of justice, prior exhaustion of local remedies is said to be required only in order that the territorial State may have the opportunity of doing justice to the alien through an exercise of its own jurisdiction. But even in these cases the local remedies rule is one of those procedural rules, like rules concerning the limitation of actions or capacity of parties, which in fact determine substantive rights rather than, or as much as, jurisdiction. Indeed, comparatively few international tribunals have thought it necessary to labour the distinction between the two branches of the local remedies rule.

10. The jurisdictional aspect was naturally more in evidence in cases involving a Calvo Clause, in the form of either a contractual stipulation or a legislative provision, by which the defendant State had attempted to impose on the alien under municipal law an express condition restricting him absolutely to local remedies and forbidding recourse to any form of international intervention by the alien's own State.[3] For the very purpose of the Calvo Clause is to make the local jurisdiction of the territorial State final

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[1] Moore, op. cit. (1898), vol. 3, pp. 3141 and 3147 respectively.

[2] Ibid., pp. 3133, 3140, 3140 and 3141 respectively.

[3] See generally Borchard, *Diplomatic Protection of Citizens Abroad* (1928), pp. 792–810; Ralston, *The Law and Procedure of International Tribunals* (1926), pp. 58–72; Lipstein in this *Year Book*, 22 (1945), pp. 130–45.

in regard to aliens as well as nationals and to take its municipal law and jurisdiction outside the control of international jurisdiction or action. It is impossible here to examine in detail the confused jurisprudence of arbitral tribunals dealing with the effect of the Calvo Clause.[1] So far as concerns the pre-League period, it must suffice to say that in the cases up to 1910, whereas a number of arbitral tribunals treated a Calvo Clause as constituting a bar to their jurisdiction, a rather larger number declined to treat the jurisdiction of an international tribunal as ousted by a condition imposed on the alien under the defendant State's municipal law and never assented to by the alien's own State.[2] Later cases exhibit similar divergencies of view and in a number of instances the tribunal did uphold an objection to jurisdiction founded upon the Calvo Clause. Thus, even the tribunal in the *North American Dredging Company* case,[3] which denied that a Calvo Clause can be effective to deprive the alien's State of its international right of intervention for denial of justice after the alien has duly exhausted local remedies, found that in the particular circumstances of the case its *jurisdiction* was ousted by the Calvo Clause. Whatever view be taken concerning the effect of a Calvo Clause on an alien's rights under the local law and thus, indirectly, on his State's right to claim that he has suffered an injury for which the territorial State is answerable internationally, it seems wholly inconsistent with fundamental principles of international law that a Calvo Clause should by itself be considered to be an effective reservation of the case in question *from the jurisdiction of the international tribunal concerned.* The jurisdiction of international tribunals, as already emphasized,[4] depends on the will of the parties and, if two States have by treaty conferred jurisdiction upon a particular tribunal in regard to stated categories of disputes, it is in the treaty alone that the limits of the tribunal's jurisdiction are to be found. Of course, if the treaty expressly or impliedly reserves cases involving a Calvo Clause, the jurisdiction of the tribunal is effectively barred —but by reason of the treaty stipulation, not of the Calvo Clause. Otherwise, it seems, on principle, that a Calvo Clause can only be relevant to the merits of the case presented by the alien's State, that is, relevant to the question whether the alien's State can under international law show any ground for an international claim in respect of the alleged injury to its national. On the merits, the efficacy of a Calvo Clause as a complete defence to any international claim by the alien's State is not easy to square with the fundamental rules that the international right of action is that of the alien's State and not of the alien himself and, secondly, that a State cannot excuse breach of its international obligations by invoking the provisions of its own municipal law. It is for reasons such as these that the prevailing view among jurists today is that a Calvo Clause, while it may have a certain efficacy as an express stipulation for the observance of the local remedies rule, is not effective to deprive the alien's State of its international rights of action under general international law in regard to the treatment of its nationals.[1] However that may be, the Calvo Clause, like the local remedies rule itself, is believed in principle to be a matter of substantive law rather than of jurisdiction and therefore to go to the merits of the claimant State's case, not to the jurisdiction of the tribunal. In short, a preliminary objection based on the Calvo Clause is, in principle, a plea to the admissibility of the claim rather than a plea to jurisdiction.

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[1] The standard of reasoning in some of the awards is far from impressive.

[2] See Harvard Research, Responsibility of States, *American Journal of International Law*, 23 (1929). Special Supplement, pp. 208–15; Borchard, op. cit., pp. 801–10.

[3] United States–Mexico General Claims Commission, *Opinions of Commissioners* (1927), vol. i, p. 21.

[4] See *supra*, p. 99.

The Covenant and the doctrine of domestic jurisdiction

It was the Covenant of the League which erected domestic jurisdiction into a distinct doctrine of international constitutional law recognizing a reserved domain of State matters which are in principle not subject to international jurisdiction. The Covenant, by establishing the League of Nations as a standing organization with compulsory jurisdiction for the conciliation of disputes likely to lead to a rupture, raised in sharp form the question of the limits of international jurisdiction. Curiously enough, comparatively little attention was given to the question during the drafting of the Covenant and, but for the United States, the Covenant might well have been signed without any reservation being made to the League's conciliation jurisdiction. The United States delegation, however, apprehensive concerning the possible reactions of Congress to a League invested with authority to intermeddle in such tender matters of United States domestic policy as tariffs and immigration, proposed that matters of domestic jurisdiction should be reserved from the conciliation jurisdiction conferred by Article 15 on the Council (or on the Assembly acting in place of the Council). Accordingly, a new clause—paragraph 8—was added to Article 15:[2]

> 'If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report and shall make no recommendation as to its settlement.'

This clause both assumed the existence in the international law of 1918 of a reserved domain of domestic jurisdiction and left its definition to be deduced from the rules of international law.

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[1] See Harvard Research, Draft Convention on Responsibility of States for Injuries to Aliens, *American Journal of International Law*, 23 (1929), Special Supplement, pp. 202 ff.

[2] The language of the clause was based on a suggestion of ex-President Taft, who indeed seems to have inspired the proposal for the reservation: Hunter Miller, *The Drafting of the Covenant* (1927), vol. i, p. 277.

Article 15 (8) was at any rate an improvement on the old formula 'Vital interests, independence and honour' found in general treaties of arbitration in the pre-League period. At least it stated the reserved domain in terms of jurisdiction and defined the content of the reserved domain by reference to the objective criterion of international law instead of by the completely subjective phrases of the old formula. Moreover, it expressly placed the power of deciding whether the reservation applied in a particular case in the hands of the Council (or Assembly) instead of leaving it to the subjective appreciation of the parties to the dispute. In short, the domestic jurisdiction clause of the Covenant had all the appearance of being a genuine constitutional provision limiting international intervention in matters reserved to States by international law.

The domestic jurisdiction clause of the Covenant, however, only applied to the conciliation jurisdiction of the Council (or Assembly) under Article 15. There was no similar reservation in regard to arbitration or judicial settlement and there is no indication in the *travaux préparatoires* of the Covenant that the question of a reserved domain was ever discussed in connexion with arbitration or judicial settlement under Articles 12–14. One reason why the framers of the Covenant did not feel any need to apply the domestic jurisdiction reservation to Articles 12–14 was, no doubt, that, although these Articles imposed on Members a general obligation to settle by arbitration or judicial settlement disputes recognized to be suitable for such forms of settlement, the Covenant did not itself invest any tribunal with jurisdiction for that purpose. Consequently, the submission of a dispute to arbitration or judicial settlement was still left very much in the hands of the parties to the dispute, who would make their own agreements to arbitrate and could frame their own reservations to those agreements. Another reason may have been that a plea of domestic jurisdiction would in any event be a relevant defence on the merits in a legal tribunal bound to apply international law. The Council in the exercise of its political jurisdiction under Article 15 of the Covenant was not obliged to restrict its recommendation for the settlement of a dispute to one based only on the strict legal rights of the parties. Accordingly, if it was desired to compel the Council to respect a reserved domain of matters of domestic jurisdiction, an appropriate constitutional limitation upon its powers was essential. But no such constitutional provision was necessary to oblige a legal tribunal to respect the legal rights of individual States in matters left by law within their exclusive discretion. Even if an arbitration treaty contained no reservation of matters of domestic jurisdiction, the arbitral tribunal would still be obliged to give effect to a well-founded plea of domestic jurisdiction as a defence on the merits of the case.

Similarly, the Statute of the Permanent Court of International Justice contained no reservation of matters of domestic jurisdiction. Although it established the Court as a standing tribunal available and competent to hear contentious cases between States, the Statute did not itself submit any particular disputes to the jurisdiction of the Court. The Statute, no less than the Covenant, thus left it to individual States to confer jurisdiction on the Court in contentious cases and States therefore remained free to make their own reservations to any jurisdiction which they might confer upon the Court by treaties of arbitration or unilateral declarations under the Optional Clause. It was, however, open to argument that there was secreted in Article 36 (2) of the Statute—the Optional Clause—an implied reservation of matters of domestic jurisdiction. For acceptance of compulsory jurisdiction under Article 36 (2) was expressly stated to be in regard to four categories of dispute which all involved matters of international law or of international obligation. It could, therefore, be represented that matters of domestic jurisdiction were by implication excepted from the Court's compulsory jurisdiction under the Optional Clause because they did not fall within any of the four named categories. At any rate, as is shown below, a plea of domestic jurisdiction was in fact founded on this argument in the *Electricity Company of Sofia* case.[1]

Although neither Covenant nor Statute contained a domestic jurisdiction clause in regard to arbitration and judicial settlement, the reservation of matters of domestic jurisdiction from the conciliation jurisdiction of the League in Article 15 (8) of the Covenant was not without its influence on arbitration and judicial settlement. The old sweeping formula of 'matters affecting vital interests, independence and honour' disappeared in treaties of arbitration concluded after the Covenant came into force.[2] Instead, there developed a tendency to borrow the domestic jurisdiction clause of Article 15 (8) and to insert it as a reservation both in treaties of arbitration and in unilateral declarations accepting the compulsory jurisdiction of the Court under the Optional Clause.[3] In treaties the process seems to have begun in the Helsingfors Convention of 1925, while the United Kingdom in 1929 was the first State to incorporate a reservation of matters of domestic jurisdiction in its declaration under the Optional Clause. The result was that in some arbitration treaties and declarations under the Optional Clause the question whether the matters in issue were or were not matters of domestic jurisdiction was expressly made a question going to the jurisdiction of the tribunal to hear the case. The jurisdiction of international tribunals depending, as it does, on the consent of the parties, a reservation of matters of domestic jurisdiction would, in principle, render the tribunal incompetent to examine into such a matter at all. On the other hand, merely reserving matters of domestic jurisdiction from the competence of the tribunal could not alter the basic fact that the question whether matters in issue are or are not matters of domestic jurisdiction is a question of substantive international law going to the legal rights of the plaintiff and defendant States on the merits. Domestic jurisdiction, as previously indicated, always has an aspect of substantive right as well as of jurisdiction, and its aspect of a substantive right is not got rid of simply by spelling out a reservation of matters of domestic jurisdiction in the instrument defining the competence of the international tribunal concerned. Accordingly, while the reservation specifically authorized and encouraged a defendant State to raise the question of domestic jurisdiction as a preliminary objection to jurisdiction rather than as a defence on the merits, it also faced the tribunal with the delicate task of reconciling, on the one hand, its need to examine into the merits in order to determine the question of domestic jurisdiction and, on the other hand, the defendant State's refusal to confer any competence at all upon the tribunal in matters of domestic jurisdiction. The Court, as will be shown later, has not always found it possible to reach a decision on the question of jurisdiction without at least some investigation of the merits.[1]

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[1] (1939), *P.C.I.J.*, Series A/B, No. 77; see *infra*, p. 115.

[2] See Wilson in *American Journal of International Law*, 23 (1929), pp. 68, 93.

[3] See Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (1931), p. 992; United Nations, *Systematic Survey of Treaties for the Pacific Settlement of Disputes, 1928–1948*, pp. 24–25 and 31–39.

If the application of a domestic jurisdiction clause was not to be largely subjective and thus seriously to undermine the jurisdiction created by the instrument, it was of crucial importance that the decision as to competence should not be left to the State concerned. Article 15 (8) of the Covenant, as has been said, specifically placed the decision as to the validity or otherwise of a plea of domestic jurisdiction in the hands of the Council or Assembly. Where then did the decision lie under treaties of arbitration and in cases under the Optional Clause? About half the treaties of arbitration concluded during the League period, which contained a domestic jurisdiction reservation, specified that any difference of opinion as to a matter being one of domestic jurisdiction was to be decided *in preliminary proceedings* by the tribunal itself.[2] The remainder were silent upon the point and there was at first some doubt whether the old principle, that the application of a reservation is within the discretion of the State invoking it, should still obtain or whether the point of jurisdiction should be decided by the tribunal.[3] The latter view prevailed and rightly prevailed, having regard to the general rule of international law that international tribunals are entitled to determine questions of jurisdiction arising under the instruments from which they derive their jurisdiction.[1] So far as concerns the Court itself, Article 36 expressly provided that disputes as to its jurisdiction were to be decided by the Court, and no State ever contended that disputes as to domestic jurisdiction were outside this provision. Nor did any State, when inserting a reservation of domestic jurisdiction in a unilateral declaration under the Optional Clause, attempt to keep the interpretation and application of the reservation in its own hands.[2]

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[1] See *infra*, pp. 113–16.

[2] See United Nations, *Systematic Survey of Treaties for the Pacific Settlement of Disputes, 1928–1948*, pp. 24–25 and 31–39. So far as is known, no preliminary objection has been dealt with by an arbitral tribunal under this form of provision. If a preliminary objection were taken under such a provision, the position of the tribunal would, it is believed, be very like the position of the Court in the *Nationality Decrees in Tunis and Morocco* Advisory Opinion: see *infra*, pp. 107–11.

[3] See Lauterpacht in *Economica*, 10 (1930), pp. 152–5.

The Advisory Opinion on the Nationality Decrees in Tunis and Morocco

The *locus classicus* on matters which by international law are matters solely of domestic jurisdiction is the Advisory Opinion given by the old Court in 1923 on the *Nationality Decrees in Tunis and Morocco.*[3] The Opinion concerned a complaint by Great Britain in regard to French Nationality Decrees the effect of which was to convert into French subjects certain categories of British subjects resident in Tunis and Morocco. Great Britain proposed the submission of the dispute to the Court for a decision on the merits, to which France objected that 'questions of nationality are too intimately connected with the actual constitution of a State to make it possible to consider them as questions of an "exclusively juridical" character'. Great Britain disagreed and said that she had no option but to submit the dispute to the Council of the League, to which France replied that in front of the Council she would rely on the reservation of matters of domestic jurisdiction in Article 15 (8) of the Covenant. The two parties then held further discussions as a result of which they (*a*) asked the Council to request the Court for an Advisory Opinion on the question whether the dispute was or was not by international law solely a matter of domestic jurisdiction within the meaning of Article 15 (8), and (*b*) agreed that, if the Court advised that it was not solely a matter of domestic jurisdiction, they would submit the dispute to arbitration or judicial settlement. The Council endorsed this plan and referred the question in (*a*) to the Court for an Advisory Opinion.

The agreement between the parties to submit the dispute to arbitration or judicial settlement in the event of the Court's disallowing France's objection to the Council's competence gave the proceedings before the Court the air of a hearing of a preliminary objection to jurisdiction in a contentious case.[4] Indeed, the parties presented written and oral pleadings in much the same way as in a contentious case. The Court, although in theory it was advising only as to the Council's competence, could not shut its eyes to the fact that subsequent judicial proceedings on the merits were in contemplation and clearly felt some concern at the possible effect which its Advisory Opinion might have on the legal position of the parties in the subsequent proceedings on the merits. For it prefaced the operative part of its opinion by saying:[1]

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[1] *Interpretation of the Greco-Turkish Agreement* (1928), *P.C.I.J.*, Series B, No. 16, p. 20; Ralston, *International Arbitration* (1946), pp. 74 ff.

[2] See Hudson, *The Permanent Court of International Justice*, 2nd ed. (1943), pp. 681–703.

[3] (1923), *P.C.I.J.*, Series B, No. 4.

[4] The Council had taken the unusual course of requesting the two States to bring the matter before the Court for its Advisory Opinion; see Series B, No. 4, p. 5.

> 'Under the terms . . . of the Council's resolution, the Court . . . has to give an opinion upon the nature and not upon the merits of the dispute, which . . . may, in certain circumstances, form the subject of a subsequent decision.
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> 'The Court therefore wishes to emphasise that no statement or argument comprised in the present opinion can be interpreted as indicating a preference on the part of the Court in favour of any particular solution, as regards the whole or any individual point of the actual dispute.'

Thus the Court showed itself very much aware that the question of domestic jurisdiction in preliminary proceedings on jurisdiction is intimately related to the substantive rights of the parties on the merits. It recognized the delicacy of the task of deciding the validity of a plea of domestic jurisdiction as an objection to jurisdiction without a full investigation of the merits and yet without prejudging the rights of the parties as they might emerge from a full investigation of the merits. Moreover, as the preliminary proceedings technically concerned an objection to the political jurisdiction of the Council and not to the jurisdiction of the Court itself, there was no possibility of solving the problem by the expedient of joining the preliminary objection to the merits and thus deferring judgment on the point of jurisdiction until after hearing full argument on the merits. In this situation the Court, if it was not to refuse an Advisory Opinion, which it would obviously be reluctant to do, was almost bound to compromise by making a superficial appreciation of the contentions of the parties and giving a *provisional* ruling on the question of domestic jurisdiction. This was the solution which it in fact adopted.

Concentrating on the phrase '*solely* within the domestic jurisdiction' ('*compétence exclusive*' in the French text) of Article 15 (8), the Court held that the legal criterion of domestic jurisdiction for determining the jurisdiction of the Council was not the same as for determining the actual legal rights of the parties on the merits of the case:[2]

> 'The question to be considered is not whether one of the parties to the dispute is or is not competent in law to take or to refrain from taking a particular action, but whether the jurisdiction claimed belongs *solely* to that party.
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> '*From one point of view, it might well be said that the jurisdiction of a State is exclusive within the limits fixed by international law—using this expression in its wider sense, that*

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[1] At p. 22.

[2] At pp. 23–24.

> *is to say, embracing both customary law and general as well as particular treaty law. But a careful scrutiny of para. 8 of Article 15 shows that it is not in this sense that exclusive jurisdiction is referred to in that paragraph.*
>
> '*The words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law.* As regards such matters, each State is sole judge.'

The Court thus laid down that, when considering the competence of the Council to make recommendations in regard to a dispute between two States, the test was the general legal nature of the matters in dispute, not the question whether the defendant State had or had not in fact acted within its legal powers under international law. The Court was not concerned with the actual legal rights of the parties on the merits but only with the legal nature of the issues raised in the dispute.

The Court explained its views on this point further in a later passage[1] when it sought to define in general terms what would and what would not suffice to bring a dispute within the jurisdiction of the Council. First, it said that the mere fact that the complainant State brought the dispute to the League would not suffice to give it an international character. Nor would it be enough that the complainant should invoke engagements of an international character, i.e. merely dress up its complaint in the guise of one founded on alleged international obligations of the defendant. But the matter in dispute would cease to be solely within the domestic jurisdiction of the defendant and would enter the domain governed by international law

> 'when once it appears that the legal grounds (titres) relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds (titres).'

The test of domestic jurisdiction laid down by the Court for the purpose of determining the Council's competence was thus whether the matters in dispute prima facie raised legal questions of an international character. It was not for the Court to consider whether these legal questions would ultimately be decided on the merits in favour of the defendant or the claimant. It was enough if, on a provisional, i.e. summary, view of the matters in dispute, there was a real legal issue of an international character raised in the dispute.

The Court, accordingly, rejected France's contention that it must exhaustively investigate the contentions of the parties on the merits and pronounce finally on France's competence under international law in regard to the disputed nationality decrees. It confined itself to a superficial examination of the four principal points in controversy between the parties, namely, (*a*) the extent of France's legislative powers under the protectorates, (*b*) the continued validity of certain British treaties made with Tunis and Morocco before the French protectorate was established, (*c*) the extent of British rights under a most-favoured-nation clause, and (*d*) an alleged British recognition of France's right to legislate in matters of nationality. It found that recourse to principles of international law was necessary in order to pronounce on each of the four points and that this fact sufficed to prove that the dispute did not arise out of a matter which by international law was solely within the domestic jurisdiction of France.

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[1] At pp. 25–26.

The Court thus held that, in deciding a question of domestic jurisdiction arising under Article 15 (8) of the Covenant, the relevant issue was not the actual legal rights of the parties in the case but the prima facie status of the matters in dispute as being governed or not being governed by rules of international law. The test applied by the Court was whether, on a summary view, the matters in dispute appeared to raise arguable points of international law.

The second point of general importance in the *Nationality Decrees* Opinion is the Court's often-quoted ruling on the element of relativity in the doctrine of domestic jurisdiction. Having said, in a passage which has already been cited,[1] that the words 'solely within the domestic jurisdiction' seemed to 'contemplate matters which . . . are not, *in principle*, regulated by international law', the Court continued:[2]

> 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus in the present state of international law, questions of nationality are, in the opinion of the Court, in principle, within this reserved domain.
>
> 'For the purpose of the present opinion, it is enough to observe that it may well happen that in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15 (8) then ceases to apply as regards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph. . . .'

Starting from the Court's hypothesis that the criterion of matters solely within domestic jurisdiction is always the prima facie status of the particular matters in dispute under international law, the conclusion was really inevitable that the boundary of the reserved domain of each State both changes with any development in general international law and is affected by the particular treaty law of that State. Those who framed Article 15 (8) of the Covenant chose not to define the reserved domain by an enumeration of specific, listed matters excluded from the jurisdiction of the League.[1] Instead, they defined it by reference to a general concept—domestic jurisdiction—the content of which is itself fixed by reference to the totality of the existing rules of international law. The content of the reserved domain, therefore, must always be the reciprocal of the content of the general rules of international law current at the time. In addition, having regard to the fact that *pacta sunt servanda* is a fundamental general rule of international law, the reserved domain of each individual State must necessarily reflect also its particular treaty obligations. The Court's relative theory of domestic jurisdiction certainly seems to have been in accord with the position prior to the Covenant. So little was domestic jurisdiction recognized as an absolute concept in the international law of the pre-League period that, as has been seen above, evidence that it existed at all as a recognized doctrine is not easy to find.

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[1] *Supra*, pp. 108–9.

[2] At p. 24.

Validity of the Court's 'provisional view' theory

Professor Lauterpacht, in a paper[2] dealing with the United Kingdom's reservation of matters of domestic jurisdiction in its declaration under the Optional Clause, seems to have queried the possibility of applying the Court's 'provisional view' theory in deciding preliminary objections to jurisdiction in contentious cases and the whole validity of the Court's assumption in the *Nationality Decrees* Opinion that, in dealing with a plea of domestic jurisdiction, it is possible to pronounce upon the competence of an international organ to investigate the dispute without at the same time pronouncing upon the rights of the parties on the merits of the case. His argument ran as follows:[3]

> '. . . Whenever the Court declares itself competent, this necessarily means a judgment on the merits. . . . It is submitted that in so far as that Opinion [*Nationality Decrees*] laid down that according to a preliminary judgment a question may *prima facie* be one regulated by international law but that a judgment on the merits may reveal that the question is one of exclusive domestic jurisdiction, it is of more theoretical than practical value. The argument that although the Court may declare itself competent in a matter claimed by the defendant State to be within its exclusive jurisdiction, but that this need not necessarily result in a final judgment in favour of the plaintiff State is to a large extent fallacious. In general there is no matter normally belonging to the sphere of exclusive domestic jurisdiction which cannot become the object of an international obligation. . . . As, therefore, there is nothing of which it could be predicted in advance that it belongs to the sphere of exclusive jurisdiction, the only task of the Court is to decide whether in the particular case there exists a concrete rule of international law limiting the State's freedom of action. If, for instance, an immigration

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[1] See further pp. 128–9 *infra*.

[2] In *Economica*, 10 (1930), 137.

[3] Loc. cit., p. 153, n. 33.

law of a State is made the subject of judicial proceedings on the ground that that law is in violation of a treaty obligation, and if the defendant State raises the plea of domestic jurisdiction, it cannot be correctly maintained that the Court may find provisionally that the treaty is relevant to the immigration law which is therefore not within the domestic jurisdiction of their State, but that a judgment on the merits may arrive at the conclusion that although the treaty is in principle relevant to the immigration law in question it does not in fact prohibit it. For that would mean that the matter *is* within the domestic jurisdiction of the defendant State, and that the relevancy as provisionally assumed did not in fact exist. It would mean that the provisional judgment was based on a general impression not substantiated by the investigation resulting in the judgment on the merits.'

This argument really denies that it is possible to do what the Court professed to do in the *Nationality Decrees* Opinion, namely, to treat the question of international jurisdiction as an issue separate from the question of the substantive rights of the parties. It maintains that the issue of domestic jurisdiction in regard to the competence of an international tribunal is virtually identical with the issue of the substantive rights of the defendant *vis-à-vis* the plaintiff.

It may be conceded that the erection of a principle concerned with the rights of States *inter se* under substantive law into a limitation upon international jurisdiction created an artificial position. It may also be conceded that, as appears below,[1] the Court has in practice found great difficulty in separating the question of jurisdiction from the merits in contentious cases. But it does not follow that the Court's 'provisional view' test for determining the application of the limitation upon international jurisdiction is necessarily based on a fallacy or that it ought to be regarded as possessing largely a theoretical value. A question of domestic jurisdiction is a mixed question of law and fact and it does not seem to the present writer that a strictly limited provisional judgment, recognizing only that, on a summary view of the case submitted by the plaintiff State, it prima facie raises issues of international law, necessarily amounts to deciding in the plaintiff's favour on the merits. Certainly, in the *Nationality Decrees* Opinion the Court's 'provisional judgment' on the point of jurisdiction did not conclude the question whether on a full examination of the relevant law and facts France would be found to have exceeded her legal rights in promulgating the decrees.[2] The fact that the Court based its 'provisional judgment' only on a summary view of the main features of the case and concerned itself only with the question whether they raised any arguable issues of international law precluded the provisional judgment from being equivalent to a decision on the merits. It is noteworthy that the United Kingdom in its arguments confined itself strictly to what it regarded as the provisional issue of the Council's jurisdiction and made no attempt to deal with the elaborate French arguments on the merits. The Court itself clearly considered that its opinion on the preliminary point of the Council's jurisdiction would still leave the legal position of the parties completely open on the merits. It may be added that in the *Anglo-Iranian Oil Co.* case[1] the Court actually stopped Counsel for Iran from going too much into the arguments on the merits and requested him to restrict himself to the preliminary point of jurisdiction. The Court could hardly have done that if there had been any question of its preliminary judgment concluding the rights of the defendant, Iran, on the merits.

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[1] Pages 113–19.

[2] Large areas of controversy were left open on each of the four points.

There is, in any event, no question of a preliminary judgment on jurisdiction being equivalent to a decision on the merits of *the defendant's case.* It touches the merits only to the extent of determining whether *the plaintiff* has any arguable cause of action under international law. Of course, a preliminary judgment on jurisdiction, by finding that the plaintiff has no arguable cause of action under international law, may be equivalent to a decision on the merits. But that is precisely what the reserved domain of matters of domestic jurisdiction means. In matters in regard to which it cannot be shown to be under any international obligations, a State is entitled to act at its uncontrolled discretion and to refuse to answer for its acts before an international tribunal.

The chief danger of the 'provisional view' theory is that the Court, by confining itself to a summary investigation of the issues, may fail to be convinced of the existence of international elements in the plaintiff's claim of which it might have been convinced after a full hearing on the merits. This has led the Court in some contentious cases to favour the practice of joining a preliminary objection to jurisdiction to the merits, thus deferring its decision on jurisdiction until after hearing full argument on the merits of the case.[2] But the Court does not adopt this practice because its 'provisional view' may be equivalent to determining the *defendant's* rights on the merits. The dismissal of a preliminary objection leaves a defendant entirely free to develop its full defence at the hearing on the merits. It adopts this practice because a 'provisional view' upholding a preliminary objection to jurisdiction forecloses the plaintiff State from any further presentation of its case and because in a plea of domestic jurisdiction the intimate relation between the question of jurisdiction and the rights of the parties on the merits may sometimes render it unsafe to form a provisional view as to the international elements in the case without full argument on the merits. It is not, however, to be inferred from the Court's practice in some cases of joining the question of jurisdiction to the merits that its 'provisional view' theory is inapplicable in contentious cases. It is believed to be no less true of contentious cases than of Advisory Opinions that if, on a summary view, the Court considered the plaintiff's case to disclose no arguable matter of international obligation at all, it would there and then sustain the defendant's preliminary objection to jurisdiction. But such cases are in the nature of things likely to be rare, because States do not normally take to Court cases in which there is no apparent legal ground on which the defendant could plausibly be argued to be under some international obligation. Consequently, it may be that, as Professor Lauterpacht suggested in 1930, though for somewhat different reasons, the 'provisional view' theory will prove to be of 'more theoretical than practical' importance in contentious cases. But no one has yet suggested any other practical method of separating the question of jurisdiction from the question of the substantive rights and obligations of the parties when a tribunal is confronted with a preliminary objection to jurisdiction on the plea that the case concerns matters within a reserved domain of domestic jurisdiction.

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[1] *I.C.J. Reports*, 1952, Pleadings, Arguments and Documents, Session of 11 June 1952.

[2] See *infra*, pp. 115–19.

The practice of the Court in regard to preliminary objections

The purpose of preliminary objections is to stop the proceedings *in limine litis* without an investigation of the merits. There are two kinds.[1] The preliminary objection may either be (*a*) an objection to jurisdiction (*exception d'incompétence*), or (*b*) an objection to the admissibility of the suit (*exception d'irrecevabilité*). An objection to jurisdiction in international law involves in one form or another the contention that the necessary consent has not been given by the defendant State to the adjudication of the particular matters in dispute by the Court. An objection to admissibility, on the other hand, involves on one ground or another the contention that there is an evident legal defect in the plaintiff's claim fatal to its success regardless of any conclusions arrived at by the Court concerning other matters in the case. The doctrine of domestic jurisdiction, it has been pointed out above, is at least as much concerned with the substantive rights and obligations of States under international law as with the limits of international jurisdiction. It follows that a preliminary objection on the ground of domestic jurisdiction may equally well take the form of a plea to the admissibility of the suit as of a plea to the jurisdiction. Technically, the correct statement of the position probably is that where the jurisdictional instrument expressly or impliedly reserves matters of domestic jurisdiction, the preliminary objection is rightly styled an objection to jurisdiction, but, where the instrument does not either expressly or impliedly reserve matters of domestic jurisdiction, the preliminary objection is strictly an objection to admissibility. This seems to be a logical deduction from the Court's treatment of the analogous plea of non-exhaustion of local remedies. In the *Losinger & Co.* case[1] and the *Panevezys–Saldutiskis Railway* case,[2] where the declarations of the parties accepting compulsory jurisdiction did not expressly reserve disputes in which local remedies had not been exhausted, the Court treated the preliminary plea of non-exhaustion of local remedies as an objection to the admissibility of the suit. But in the *Electricity Company of Sofia* case,[3] where a general treaty of arbitration between Belgium and Bulgaria did expressly reserve disputes in which local remedies had not been exhausted, the Court treated the preliminary plea as an objection to jurisdiction. At the same time, it appears that a reservation of matters of domestic jurisdiction may be implied from an express limitation of the Court's jurisdiction to the four classes of legal disputes mentioned in Article 36 (2) of the Statute, all of which involve international law or international obligation.[4] Accordingly, it is only under arbitration treaties conferring a completely general jurisdiction on the Court that a preliminary plea of domestic jurisdiction seems properly to be an objection to admissibility rather than an objection to jurisdiction.

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[1] See Article 62 of the Rules, and *German Interests in Polish Upper Silesia Case* (1925), *P.C.I.J.*, Series A, No. 6, p. 19.

It appears, however, to be immaterial whether in a particular case a preliminary plea of domestic jurisdiction is to be treated as an objection going to jurisdiction or to admissibility. Both forms of preliminary objection are allowed under Article 62 of the Rules of Court and both appear to be dealt with on the same principles.[5] In earlier years the Court appears to have assumed that it ought to try to dispose of a preliminary objection in the preliminary proceedings and was more inclined to trespass on the merits if this was necessary in order to decide the preliminary plea. But in the *Pless* case[6] in 1933 the Court adopted the expedient of joining to the merits a preliminary objection to the admissibility of the claim. It did not overrule the preliminary plea but deferred its decision upon the plea until the hearing on the merits. In 1936 the Rules were altered to provide expressly that preliminary objections may either be disposed of finally at once or joined to the merits. Since this change in the Rules the Court has always postponed until the hearing on the merits any preliminary objection which it considered to be too closely linked to the merits to be decided without investigating the merits.[7] Indeed, in the *Losinger & Co.* case[8] the Court laid down that the Statute and the Rules of Court together confer on the parties to a case *an actual right to present written pleadings and oral arguments on the merits before the Court is entitled in any way to enter upon the merits* even for the purpose of reaching a decision on jurisdiction.

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[1] (1936), Series A/B, No. 67.

[2] (1939), Series A/B, No. 76.

[3] (1939), Series A/B, No. 77, pp. 78–80.

[4] There was no express reservation of matters of domestic jurisdiction in the Belgo-Bulgarian acceptances of compulsory jurisdiction in the *Electricity Company of Sofia* case. Bulgaria framed her preliminary plea as an objection to jurisdiction on the basis that the case did not fall under any of the four classes of dispute in Article 36 (2) of the Statute. See *infra*, pp. 118–19.

[5] See *Panevezys–Saldutiskis Railway* case (1939), Series A/B, No. 76, pp. 16 ff.

[6] (1933), Series A/B, No. 52, p. 16.

[7] See Hudson, *The Permanent Court of International Justice*, 2nd ed. (1943), pp. 681–703.

[8] (1936), Series A/B, No. 67, p. 24.

Having regard to the above practice of the Court in dealing with preliminary objections and to the fact that in a plea of domestic jurisdiction the question of jurisdiction is always intimately related to the merits, it is obvious that a preliminary objection founded on a domestic jurisdiction clause is a frail instrument for stopping the proceedings *in limine*. Only when it is manifest, on a summary view of the case presented by the claimant, that it contains no arguable basis for an international cause of action, will the Court be likely to refrain from joining the preliminary objection to the merits and to stop the case *in limine*. When the Court joins a preliminary objection to jurisdiction to the merits, it will, in its judgment on the merits, make a decision first on the preliminary objection and, if it upholds the objection, it will not deal further with the merits.

The plea of domestic jurisdiction in contentious cases before the Permanent Court of International Justice

The jurisprudence of the Permanent Court in contentious cases contains no pronouncement on domestic jurisdiction comparable in importance with that in the *Nationality Decrees* Opinion. Nevertheless, there are two illuminating orders in preliminary proceedings and one or two pronouncements in judgments on the merits which provide useful indications of the Court's attitude to a plea of domestic jurisdiction. It will be convenient to examine the two preliminary objections first.

In the *Losinger & Co.* case,[1] the issues in which have some resemblances to those in the *Anglo-Iranian Oil Co.* case,[2] a Swiss company held a concession from the Yugoslav Government for the construction of a railway. A clause in the agreement provided that any dispute between the company and the Government should be submitted to an independent arbitral tribunal. After the concession had been operated for about four years a dispute arose and was referred to the tribunal, which made an award. Meanwhile, however, the Yugoslav Government had cancelled the concession and had passed a new general law under which actions against the State could only be brought before the ordinary courts. On the company beginning a new suit before the arbitral tribunal the Government pleaded that the tribunal, by reason of the new Yugoslav law, had no jurisdiction and that the company's claim could only be submitted to the ordinary courts.

[1] (1936), Series A/B, No. 67.
[2] *I.C.J. Reports*, 1952, p. 90.

The arbitrator held that he had no power to pronounce upon the Government's plea and suspended the proceedings until the position under Yugoslav law had been ascertained. The Swiss Government then instituted a denial of justice claim before the Permanent Court, invoking the Swiss and Yugoslav acceptances of compulsory jurisdiction. Yugoslavia's declaration under the Optional Clause contained an express reservation of matters of domestic jurisdiction and she lodged a preliminary objection to jurisdiction on that ground. Although there was no contest as to the facts, the Court declined to deal with the preliminary objection in advance of the hearing on the merits. Having found that the issues raised in the Swiss claim on the merits were intimately connected with the issues raised in Yugoslavia's plea to the jurisdiction, the Court said:[1]

> 'Whereas the latter plea may be regarded, from this point of view, as a part of the defence on the merits, or at any rate as being founded on arguments which might be employed for the purpose of that defence;
>
> 'Whereas, in those circumstances, the Court might be in danger, were it to adjudicate now upon the plea to the jurisdiction, of passing upon questions which appertain to the merits of the case, or of prejudging their solution;
>
> 'Whereas the Court cannot enter in any way on the merits of a case that has been submitted to it by Application under Article 36 (2) of the Statute, before the Parties have had an opportunity of exercising the right conferred upon them by the Statute and the Rules of Court of each submitting two written pleadings, and of making oral statements on the merits of the dispute . . .;
>
> 'Whereas, in view of these considerations, the objection to the jurisdiction should be joined to the merits, so that the Court will give its decision upon it, and if need be, on the merits, in one and the same judgment.'

Nothing could be clearer than that the Court in this comparatively uncomplicated case, the facts of which were not in controversy, considered the plea of domestic jurisdiction to be in essence a defence on the merits and incapable of decision without a hearing on the merits.

The Yugoslav Government had also pleaded in the alternative 'non-exhaustion of local remedies' as an objection to admissibility. As to this plea the Court said[2] that the facts and arguments adduced for and against the objection to admissibility were largely interconnected with those arising on the plea of domestic jurisdiction and 'were even in some respects indistinguishable'. Accordingly, the issue of non-exhaustion of local remedies was also joined to the merits. The reason, of course, was that the question whether the matter was one of domestic jurisdiction and the question whether the company must first exhaust local remedies both depended on the issue whether international law left Yugoslavia free, without committing a denial of justice, to substitute a remedy before the ordinary courts for the special remedy by arbitration contracted for in the concession agreement.

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[1] (1936), Series A/B, No. 67, at p. 23.

[2] Ibid., p. 24.

The facts in the *Electricity Company of Sofia* case[1] were very involved and it must suffice here merely to indicate the nature of the issues on the merits. Before the First World War a Belgian company had held a concession from the Municipality of Sofia for the supply of electricity to the city. After the war the peace treaty required Bulgaria to restore the concession to the company on conditions to be fixed by a mixed arbitral tribunal. The latter duly fixed the conditions which included a formula for determining the tariff which the company was to be entitled to charge. The formula was based on several factors, notably the price of coal and the rate of company taxation. Broadly speaking, the company's complaint was that it had suffered a denial of justice by reason of the facts that (*a*) Bulgarian authorities by legislative and administrative measures had manipulated these factors so as to distort the application of the formula, and (*b*) Bulgarian courts in actions before them had given effect to these manipulations of the various factors. The state of the litigation in the Bulgarian courts was that the company, having lost in the appeal court, had appealed to the Court of Cassation whose judgment had not yet been given. At that point the Belgian Government intervened on behalf of its national and instituted proceedings before the Permanent Court by application, relying on (1) a Belgo-Bulgarian treaty of arbitration, and (2) acceptances of the Court's compulsory jurisdiction by herself and Bulgaria.

The arbitration treaty did not contain an express reservation of matters of domestic jurisdiction but it did limit acceptance of the Court's jurisdiction specifically to the four classes of disputes listed in Article 36 (2) of the Statute. Bulgaria's preliminary objection was therefore directed to showing that the case did not fall within one of the four classes. She contended that 'the right of the Bulgarian authorities to exercise jurisdiction over disputes concerning the application of provisions governing the working conditions of a public service conceded in Bulgaria, *is inherent in the sovereignty of the Bulgarian State*', and on that ground disputed the Court's jurisdiction under the treaty.[2] The Court, after remarking that Belgium's argument was that the acts of the Bulgarian authorities constituted a violation of Bulgaria's international obligations towards Belgium, declined absolutely to treat the Bulgarian plea as a preliminary objection to jurisdiction:[3]

> ✓ 'The argument *ratione materiae* . . . used in support of the preliminary objection to the jurisdiction forms a part of the actual merits of the dispute. The Court cannot therefore regard this plea as possessing the character of a preliminary objection within the meaning of Article 62 of the Rules.'

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[1] (1939), Series A/B, No. 77.

[2] This was, clearly, a claim that the matters in dispute were within Bulgaria's 'reserved domain'.

[3] Series A/B, No. 77, p. 78.

The Court, on the other hand, found itself obliged to uphold a second Bulgarian plea based on a clause in the treaty which entitled Bulgaria to object to any matter within the competence of her judicial or administrative authorities being made the subject of a case before the Permanent Court until a 'decision with final effect' had been pronounced in Bulgaria. It was clear on the facts that this condition had not been fulfilled.

It therefore became necessary for the Court to consider also the question whether it had jurisdiction under the Belgian and Bulgarian acceptances of compulsory jurisdiction. Again, there was no express reservation of matters of domestic jurisdiction and the Bulgarian plea of domestic jurisdiction was directed to showing that the case fell outside any of the four classes of dispute listed in Article 36 (2) of the Statute. Again, the plea was that the matters with which the dispute was concerned were inherent in the sovereignty of Bulgaria and therefore not justiciable by the Court under its compulsory jurisdiction. Again, the Court declined absolutely to treat the plea as a preliminary objection:[1]

> 'Although this argument is designed to prove that the Court has no jurisdiction and to prevent the proceedings from being continued, the Court, after considering its scope, has arrived at the conclusion that this objection is closely linked to the merits of the case. The reasoning in fact aims at establishing that there is no international element in the legal relation created between the Belgian Company and the Bulgarian authorities by the awards of the Mixed Arbitral Tribunal. But that amounts not only to encroaching on the merits but to coming to a decision in regard to one of the fundamental factors of the case. The Court cannot therefore regard this plea as possessing the character of a preliminary objection within the meaning of Article 62 of the Rules.'

The plea of the reserved domain not being recognized to be a preliminary objection at all, there was no question of its being 'joined to the merits' under Article 62 of the Rules and no such order was made in this case. In short, the Court here simply treated the plea as one of the arguable defences on the merits and left Bulgaria to pursue it in the proceedings on the merits.

Both in the *Losinger & Co.* and *Electricity Company of Sofia* cases the dispute was settled out of Court before the final hearing so that, unfortunately, the Court was deprived of the opportunity of pronouncing upon the operation of the principle of domestic jurisdiction in contentious cases. But the attitude of the Court towards the plea of domestic jurisdiction, when dealing with it as a preliminary objection, shows clearly that it did not accept the idea of a reserved sphere of inherently domestic matters into which the jurisdiction of an international tribunal cannot penetrate to see whether there has been any breach of an international obligation. At the preliminary hearings of the *Losinger & Co.* and *Electricity Company of Sofia* cases the Court without doubt regarded the question of domestic jurisdiction simply as the question whether the case submitted to it prima facie disclosed an arguable breach of an international obligation. The clear implication is that, if at the final hearing the claimant State had succeeded in establishing any breach of an international obligation, the Court would have pronounced judgment in its favour regardless of any supposedly inherent domestic or non-domestic nature of the matters to which that obligation related. This implication is borne out by a dictum in the *Oscar Chinn* case[1] when the Court rejected a Belgian argument on the merits that measures taken in the management and subsidizing of national shipping on the Congo river could not constitute a breach of Belgium's obligations under the Treaty of St. Germain concerning freedom of trade and commerce. The Court said: 'However legitimate and unfettered governmental action in connection with the management and subsidizing of national shipping may be, it is clear that this does not authorise a State to evade on this account its international obligations.' In other words, matters inherently appertaining to internal sovereignty are always subject to treaty obligations.

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[1] At pp. 82–83.

The same line was taken by the Court in its Advisory Opinion on the *Treatment of Polish Nationals in Danzig*[2] where the issue of domestic jurisdiction arose not in the form of an objection to the League's jurisdiction lodged under Article 15 (8) of the Covenant but as a substantive issue concerned with the extent of Poland's right to intervene in Danzig. The issue in effect was whether Poland was entitled to submit to the arbitration of the League's High Commissioner for Danzig complaints in regard to what she conceived to be the misapplication of the Danzig constitution to Polish nationals resident in Danzig. Poland based her complaints not upon any denial of justice or other breach of general international law but simply upon an alleged misapplication of the provisions of the constitution. She conceded that 'in general the application of a constitution is essentially a matter of domestic concern' but contended that owing to the peculiar character of the Danzig constitution the 'ordinary legal distinction between matters of a domestic and of an international character' did not hold good in the instant case.[3] The short point therefore was whether the fact that the Danzig constitution had been drawn up in pursuance of Article 103 of the Treaty of Versailles and under the auspices and guarantee of the League operated, as between Poland and Danzig, to remove the question of its application from the sphere of matters exclusively within the domestic jurisdiction of Danzig. The Court rejected the Polish argument. It held that the peculiar legal status of the Danzig constitution did not operate to displace the ordinary rules governing relations between States. The peculiar status of the constitution affected only the relations between

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[1] (1934), Series A/B, No. 63, p. 86.

[2] (1932), Series A/B, No. 44.

[3] Ibid., p. 23.

Danzig and the League. As between Poland and Danzig, the latter's constitution was that of a foreign State and Poland was not, therefore, entitled to treat its interpretation and application by Danzig as automatically a matter in which Poland had a legal right to intervene.

The Court in the *Danzig* Opinion, although it expressly endorsed the view that the interpretation and application of a constitution is, in principle, a matter of domestic concern, at the same time went out of its way to underline that the domestic character of a State's constitution only holds good to the extent that it is not modified by the State's international obligations. For the Court emphasized that in an international tribunal a State's rights internally under its constitution are subordinated to its obligations externally under international law. It said:[1]

> 'It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. *Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig.*'

The Court then said in terms that Poland would undoubtedly have been entitled to lodge an international complaint against Danzig if she had been able to point to an application of the Danzig constitution amounting to a violation of an international obligation incumbent on Danzig towards Poland, whether a treaty obligation or an obligation under general international law. It follows that the Court in the *Danzig* Opinion, although approaching the question from a slightly different angle, in effect reasserted the relativity theory of domestic jurisdiction which it had enunciated in the *Nationality Decrees* Opinion.[2] Similarly, in its Opinion on *The Exchange of Greek and Turkish Populations*[3] the Court held that the interpretation of a treaty, although it might relate to a point of Turkish domestic law, was necessarily a question of international law and not one of domestic concern.

The relevance of Article 2 (7) of the Charter in regard to the contentious jurisdiction of the International Court of Justice

The reservation of matters of domestic jurisdiction in Article 15 (8) of the Covenant, it was emphasized above,[4] related to the conciliation jurisdiction of the Council and Assembly and did not touch the contentious jurisdiction of the Permanent Court. The reservation of matters of domestic jurisdiction in Article 2 (7) of the Charter was deliberately given a much wider sweep and the question is whether in the process it has been made a constitutional limitation upon the contentious jurisdiction of the International Court. The material words in Article 2 (7) read:

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[1] At p. 24.

[2] See *supra*, p. 110.

[3] (1925), Series B, No. 10, p. 17.

[4] See p. 104.

> 'Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter.'

In the *Anglo-Iranian Oil Company* case,[1] Iran contended that these words, in conjunction with the provisions of Articles 7 and 92 of the Charter, operated to subject the Court's contentious jurisdiction to a constitutional reservation of matters 'essentially within the domestic jurisdiction of any State'. First, Article 92 refers to the Statute of the Court as 'annexed' to the Charter and expressly states that it 'forms an integral part of the present Charter'. Secondly, Article 7 expressly makes the International Court one of the six principal organs of the United Nations. Consequently, reasoned Iran, Article 2 (7), so far as the Court is concerned, has to be applied as if it read as follows:

> 'Nothing in the present Charter and annexed Statute shall authorise the International Court of Justice to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter and annexed Statute.'

As the Statute contains some provisions relating to the exercise of the Court's contentious jurisdiction, Article 2 (7), according to the Iranian argument, would establish a definite constitutional limitation upon the Court's jurisdiction in all contentious cases.

A second preliminary objection by Iran, *ratione temporis*, was upheld by the Court which was not, therefore, called upon to express any view concerning the application of Article 2 (7) to its contentious jurisdiction.[2] Article 2 (7) does not, however, appear to have the effect contended for by Iran. In the first place, it may be doubted whether in the phrase 'Nothing in the present Charter' the word 'Charter' was used as including, without mention, the Statute of the Court. The internal evidence of the Charter and Statute suggest that in either instrument the word 'Charter' is used to denote only the articles of the Charter itself.[3] In the second place, even if Article 2 (7) is read in the way propounded by Iran, it does not at all follow that the effect of Article 2 (7) is to apply a reservation of 'matters essentially within domestic jurisdiction' to all the jurisdiction of the Court in contentious cases. For even in that case Article 2 (7) merely provides that nothing in the Charter or Statute is to be taken to *authorize* the Court to intervene in matters essentially within the domestic jurisdiction of any State. There is nothing in the words of Article 2 (7) to preclude the Court, or any other organ of the United Nations, from intervening in matters essentially within domestic jurisdiction *if it has been authorized to do so by the States concerned in an instrument dehors the Charter*. The purpose and effect of Article 2 (7) is really to protect signatories of the Charter from being afterwards told that by subscribing to the provisions of the Charter they had authorized the United Nations to intervene in matters essentially within their own domestic jurisdiction.

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[1] *I.C.J. Reports*, 1952, Pleadings, Arguments and Documents, pp. 292 and 466.

[2] *I.C.J. Reports*, 1952.

[3] For example, despite the Statute being made an integral part of the Charter, Article 93 provides that parties to the Charter are also to be parties to the Statute. Again, in Article 108 dealing with the machinery for amendment of the Charter the phrase 'the present Charter' cannot include the Statute of the Court which contains its own article dealing with amendments of the Statute. In the Statute itself the Charter is always referred to as if it were a separate self-contained instrument.

The reservation in Article 2 (7) has point in regard to the political functions of the United Nations since the Charter does confer a wide authority on the political organs of the United Nations to take up matters affecting the interests of individual States without their consent. Thus there is a wide grant of jurisdiction to the political organs of the United Nations in the Charter and then a specific reservation of matters essentially within domestic jurisdiction. But the reservation in Article 2 (7) is meaningless in regard to the contentious jurisdiction of the Court. Neither the Charter nor the Statute confers any authority on the Court to decide or entertain any contentious case without the consent of the parties to that case. The Charter and the new Statute, like the Covenant and the old Statute, do no more than provide for the establishment of the Court and for the exercise of its jurisdiction in a contentious case, if and when States by acts independent of the Charter confer authority on the Court to adjudicate in a specific case or in specific categories of cases. Any authority that the Court may at any time possess to 'intervene' in contentious cases is thus derived not from 'the present Charter' but from the consent of States given in other instruments.[1] Consequently, there is no basis for applying Article 2 (7) in connexion with the Court's contentious jurisdiction. The position would have been different if, as many States wished, the Charter had conferred compulsory jurisdiction on the Court in legal disputes. In that event Article 2 (7) would have operated to reserve 'matters essentially within domestic jurisdiction' from the compulsory jurisdiction thus conferred on the Court *by the Charter*. But even in that event Article 2 (7), according to its terms, would have been without relevance in regard to jurisdiction conferred on the Court in other instruments independent of the Charter. In the actual form in which the provisions of the Charter and Statute relating to the Court's contentious jurisdiction are found, it may be said with confidence that Article 2 (7) of the Charter does not, as such, touch the Court's jurisdiction in contentious cases.[1]

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[1] Or, at least, by other acts in cases where the Court's jurisdiction is established on the principle of the *forum prorogatum*.

It follows that before the new Court, as before the old Court, the question whether a plea of domestic jurisdiction, however formulated, is available as a plea to the Court's jurisdiction depends on the terms of the instrument by which the defendant State is alleged to have conferred jurisdiction on the Court. If the instrument contains an express or implied reservation of matters of domestic jurisdiction, then it is open to the defendant State to plead the reserved domain as a preliminary objection to jurisdiction. Otherwise the plea can only be properly raised as a defence on the merits of the case.

Article 15 (8) of the Covenant, it was pointed out above,[2] had an indirect effect on the jurisdiction of the Permanent Court in as much as the reservation in Article 15 (8) was afterwards introduced into a number of arbitration treaties and declarations under the Optional Clause. The new Statute of the Court provides that former treaties of arbitration and former declarations under the Optional Clause which conferred jurisdiction on the Permanent Court, are to continue in force according to their terms, the new Court being, in effect, substituted for the Permanent Court in the body of the instrument concerned.[3] In consequence, there are among the jurisdictional instruments applicable to the new Court a number of former treaties and former declarations under the Optional Clause which contain a reservation in accordance with the formula of Article 15 (8), i.e. a reservation of matters which by international law are solely within the domestic jurisdiction of the State concerned. Indeed, in the *Anglo-Iranian Oil Company* case, which the United Kingdom brought before the Court by unilateral application, the declarations of both States under the Optional Clause contained a reservation of matters of domestic jurisdiction in the terms of Article 15 (8). Iran, however, seeking to enlarge the scope of the reserved domain so as to make it cover 'matters *essentially* within' instead of merely 'matters left by international law solely within' her domestic jurisdiction, contended that all previous reservations in the terms of Article 15 (8) of the Covenant must now be interpreted in the light of the changed concept of the reserved domain which is expressed in Article 2 (7) of the Charter.[4] The Iranian thesis, in effect, was: (1) treaties (and, by analogy, declarations under the Optional Clause) have a 'life of their own' and their meaning may change in the light of subsequent interpretation by the parties; (2) Article 2 (7) represents the generally accepted concept of the reserved domain in modern international law and is a subsequent interpretation of their reservations by parties to former treaties or declarations; (3) consequently, in pre-Charter jurisdictional instruments the Covenant form of domestic jurisdiction reservation has now to be replaced by the Charter formula, 'matters essentially within the domestic jurisdiction'. This thesis does not carry conviction. In the first place, the Charter formula met with strong objections from a number of States at San Francisco and was only accepted as necessary to secure the adherence of the United States to the Charter. Secondly, the Charter formula even within the Charter itself does not seem, as already pointed out, to have been made applicable to the contentious jurisdiction of the Court. Thirdly, so far as concerns declarations under the Optional Clause, Article 36 (5) of the new Statute expressly states that declarations under the old Statute are to be deemed to be acceptances of the compulsory jurisdiction of the new Court 'in accordance with their terms' which would seem to preclude any new meaning being given to the former declarations.[1] Finally, the Institute in Article 2 of its 1954 Resolutions went out of its way to insist that the formula 'matters which are essentially within the domestic jurisdiction of States' is not of general application and relates only to the competence of those international organizations in whose constituent instruments the formula occurs.[2]

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[1] See Kopelmanas, *L'Organisation des Nations Unies* (1947), p. 236. The Institute also seems to have assumed that Article 2 (7) does not touch the contentious jurisdiction of the Court, when it drew up its 1954 Resolutions. Otherwise, it would scarcely have attached the importance which it did to its Second Resolution; see *supra*, p. 97. Kelsen, however, expresses a different view in his *Law of the United Nations* (1950), p. 784.

[2] Page 105.

[3] Articles 36 (5) and 37.

[4] *I.C.J. Reports*, 1952: Pleadings, Arguments and Documents, p. 623.

The formula of the reserved domain in Article 2 (7) of the Charter, as happened in the case of Article 15 (8) of the Covenant, has been introduced into some instruments conferring contentious jurisdiction on the Court. The United States, author of the vague formula in Article 2 (7), has also been responsible for introducing it into instruments purporting to establish the compulsory jurisdiction of the Court. Unfortunately, however, the United States has employed a debased version of Article 2 (7) under which it comes near to taking away in the reservation the compulsory jurisdiction which it appears to grant in the body of the instrument. Thus, in its declaration under the Optional Clause the United States reserved

> 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*'.

This reservation has also been incorporated by the United States in a number of its treaties by making its acceptance of the Court's jurisdiction under the treaty subject to the limitations contained in its declaration under the Optional Clause.[3] Worse still, the example set by the United

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[1] Australia in 1954 made a new declaration under the Optional Clause deliberately using the Covenant formula in its reservation of matters of domestic jurisdiction.

[2] See *supra*, p. 97.

[3] E.g., the Pact of Bogotá: *Year Book of the International Court of Justice*, 1947–8, p. 144, n. 2; United States Economic Aid Agreement with China: ibid., 1948–9, p. 153.

States of claiming the right to decide for itself the scope of its own reserved domain has been followed by Mexico (1947), Pakistan (1948), France (1949), and Liberia (1953).[1] The three latter States have virtually copied the United States declaration. Mexico has not employed the '*essentially* within' formula of the Charter but has reserved 'matters that, in the opinion of the Mexican Government, are within the domestic jurisdiction of the United States of Mexico'. These four States and the United States have not, therefore, thought that even the loose Charter formula, 'matters which are essentially within the domestic jurisdiction', is a sufficient reservation of the matters which they wish to exclude from the compulsory jurisdiction of the Court as being matters of domestic jurisdiction. They have adopted the simple, if reactionary, expedient of arrogating to themselves the right in any given case to pronounce upon the validity of their own plea that the case concerns matters within their reserved domain. This is tantamount to a reversion to the position before the Covenant when States asserted a general right to determine the scope and application of their reservations. These special versions apart, the Article 2 (7) formula of the reserved domain does not appear in many jurisdictional instruments. One example, however, is the Pact of Bogotá, Article VII of which reserves from the compulsory jurisdiction conferred on the Court 'matters which, *by their nature*, are within domestic jurisdiction'. For the phrase 'by their nature' seems to have been used in that Article merely as an equivalent of the word 'essentially'.

'*Matters essentially within domestic jurisdiction*' *as a formulation of the reserved domain in contentious cases before international legal tribunals*

As previously stated,[2] a general examination of the meaning of the formula, 'matters . . . essentially within the domestic jurisdiction', contained in Article 2 (7) of the Charter is outside the scope of the present article. It is, however, necessary here to examine briefly the implications of that formula in the particular context of a reservation from a grant of contentious jurisdiction to an international legal tribunal. The question is whether the scope of the reserved domain, as defined by the Permanent Court in the *Nationality Decrees* Opinion,[3] is altered by the substitution of 'essence' for 'international law' as the deciding factor in determining whether particular matters are or are not within domestic jurisdiction.

The *travaux préparatoires* of the San Francisco Conference relating to Article 2 (7) are confused and throw an uncertain light on the meaning to be given to the formula 'matters essentially within domestic jurisdiction'.[1] The explanations given by the United States delegates, both at the Conference and in their subsequent 'Report to the President' on the Conference, of the reasons for substituting this formula for the one in Article 15 (8) of the Covenant show little appreciation of the relevant international law. In their Report to the President they said of the omission of any reference to international law in the new formula:[2]

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[1] *Year Book of the International Court of Justice*, 1953–4, pp. 218, 219, 215 and 217 respectively. See also Peru's reservation to Article V of the Pact of Bogotá in which she claimed that 'domestic jurisdiction should be defined by the State itself'.

[2] *Supra*, p. 96.

[3] See *supra*, pp. 107–11.

> 'This deletion was supported by the argument that the body of international law on this subject is indefinite and inadequate. To the extent that the matter is dealt with by international practice and by text writers, the conceptions are antiquated and not of a character which ought to be frozen into the new Organisation.'

This statement completely overlooks the *Nationality Decrees* Opinion, which lays down the clear rule that the reserved domain consists of the matters in regard to which a State is not bound by a rule of international law, and the central point of which is that the boundaries of the reserved domain are not frozen but move with every development of international law. Secondly, the United States delegates said as to the omission of the word 'solely' and the introduction of the word 'essentially':[3]

> 'It seemed ineffectual to use "solely" as a test in view of the fact that under modern conditions what one nation does domestically almost always has at least some external repercussions. It seemed more appropriate to look to what was the essence, the heart, of the matter rather than to be compelled to determine that a certain matter was "solely" domestic in character.'

This statement neglects the fact that any question of jurisdiction, whether in municipal or international law, is by its very nature a question of legal relations and not of 'repercussions'. The whole idea of the reserved domain in international law is of matters in regard to which a State has the right to act as it thinks fit regardless of the repercussions upon the interests of other States. It is that which is the 'essence, the heart', of the reserved domain. The repercussions on the interests of another State—or on the interests of the international community as a whole—are relevant precisely to the extent that they touch the legal rights of that other State or of the international community.

A possible explanation of the United States attitude in regard to the reserved domain, both in 1919 at Versailles and in 1945 at San Francisco, is that it had a preconceived idea that there exists in international law a distinct constitutional doctrine of the reserved powers of States akin to that found in the United States Constitution. This pre-conception is, indeed, true to the extent that, just as in the United States Constitution any powers not given to the Federal Government are reserved to the States, so also in the international system any powers not regulated by international law are reserved to individual States. The difference lies in the fact that under the United States Constitution the powers given to the Federal Government are enumerated and to a large extent fixed so that the boundary line between Federal jurisdiction and the reserved domain of the States is comparatively rigid.[1] Under the loose and highly flexible international constitution, on the other hand, the creation of new rules of international law contracting or enlarging the reserved domain is to a large extent at the will of the individual State so that the boundary between international and State jurisdiction is always fluid. Each State, for this purpose, has a large power of constitutional amendment. It is, therefore, a misconception that in international law some matters by their very nature qualify themselves as belonging to the reserved domain of States. In the United States system matters do qualify themselves as belonging either to Federal or to State (or to concurrent Federal and State) jurisdiction by reference to the fixed criteria laid down in Article 1 of the Constitution. In the international system matters do not qualify themselves as belonging to international or State jurisdiction except by reference to the ever-changing criteria of the corpus of the rules of international law, including treaty law, in force at the time in question.

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[1] United Nations Conference on International Organisation, Documents, VI, pp. 507–13.

[2] At p. 44.

[3] At p. 45.

In 1919, as is well known, the object of the United States in proposing the insertion of a reservation of matters of domestic jurisdiction in Article 15 of the Covenant was to exclude any possibility of intervention by the League in particular matters, such as tariffs and immigration, in regard to which Congress had always shown itself especially sensitive.[2] But that object—had the United States ratified the Covenant—would not necessarily have been secured by the general definition of the reserved domain in Article 15 (8) because, as the Court held in the *Nationality Decrees* Opinion,[3] any international obligations undertaken by the United States in respect of the matters in question would have operated to remove them from its reserved domain into the sphere of the League's jurisdiction. The only sure way of achieving the United States object would have been to apply the enumerative method adopted in the United States Constitution in the inverted form of an enumeration of the particular matters reserved to individual States. It appears that an enumerative formula was not in fact proposed by the United States in 1919 because of the fear of omitting some particular matter which might afterwards prove to be of critical importance in United States domestic politics. In the subsequent debates in the Senate on ratification of the Covenant Senator Lodge sought to overcome the difficulty by proposing a United States reservation containing (1) a general reservation of all domestic and political questions relating in whole or in part to its internal affairs, (2) a declaration enumerating a number of particular matters as some of the matters included within the general reservation, and, for good measure, (3) a right to decide for itself in all cases what questions are within its domestic jurisdiction.[1] The third point was of course in conflict with Article 15 (8) of the Covenant, under which it was for the Council to decide the validity or otherwise of any objection to its jurisdiction taken on the score of domestic jurisdiction. With the failure of the United States to ratify the Covenant, the Lodge reservation fell to the ground, but its ghost remained to haunt the United States delegation at San Francisco and to debilitate the United States acceptance of the compulsory jurisdiction of the Court.

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[1] The broad language of Article 1 of the Constitution and the process of judicial interpretation insure that this 'rigidity' is by no means complete.

[2] See Hunter Miller, *The Drafting of the Covenant* (1927), vol. i, p. 277.

[3] See *supra*, pp. 110–11.

Any formula so sweeping and crudely subjective as the Lodge reservation had little chance of acceptance by the majority at San Francisco. So, the United States thought to solve the problem by proposing the 'essence' formula of Article 2 (7) of the Charter. But this formula, unless the decision as to what matters are essentially of domestic jurisdiction is left to the individual State concerned, does not appear to be much better designed to secure the United States object than the formula in the Covenant. Jurisdiction, as was said previously, is by its very nature a matter of legal relation, and matters can only qualify themselves as being of domestic or international jurisdiction by reference to their legal status under international law. It is for this reason that many writers maintain—it is believed correctly—that the mere omission of the words 'by international law' from the formula in Article 2 (7) does not affect its legal interpretation, whatever may have been the intention of its authors. The criterion of the scope of the reserved domain under the Charter must still be found in international law and the only relevant inquiry, therefore, is whether international law contains any criterion determining the matters which are *in essence* matters of domestic jurisdiction. The obvious starting-point for this inquiry is the *Nationality Decrees* Opinion set out on pp. 107–12 above, where the Permanent Court referred to 'matters which, though they may very closely concern the interests of more than one State, are not, *in principle*, regulated by international law' and held that nationality is one such matter. In the same passage the Court went on to lay down that a matter which, *in principle*, is within the reserved domain, may be brought within international jurisdiction either by developments in general international law or by the assumption of particular international obligations in regard to that matter by the State concerned. The *Nationality Decrees* Opinion, therefore, although the Court was directing its attention to 'matters *solely* within domestic jurisdiction', does tend to suggest that 'matters *essentially* within domestic jurisdiction' are those matters which at the given time are not regulated by any rule of *general international law*. But this view, which would base the criterion of 'matters essentially within domestic jurisdiction' on the distinction between general and particular rules of international law, meets an obstacle in the *Nationality Decrees* Opinion itself and in other jurisprudence of the Court. When a matter which is, in principle, within domestic jurisdiction is made the subject of a treaty and a dispute then arises, the 'matter' in dispute is not the matter of domestic jurisdiction but the obligations of the State concerned under the treaty.[1] No rule of international law is more conspicuously part of general international law than the rule *pacta sunt servanda*, and the Court in the *Nationality Decrees* Opinion and in other cases has consistently repudiated the idea that matters of treaty obligation can be matters of domestic jurisdiction, regardless of the subject-matter of the treaty obligation.[2] Moreover, as will be shown later,[3] the United States and the United Kingdom, basing themselves on the jurisprudence of the Permanent Court, strongly insisted in the *Interpretation of Peace Treaties* Opinion that matters of treaty obligation cannot be '*essentially* within domestic jurisdiction'.[4] Thus, if the criterion of 'matters essentially within domestic jurisdiction' is sought in the distinction between general and particular international law, that criterion, owing to treaties being matters of international jurisdiction, leaves the scope of the reserved domain very much where it was under Article 15 (8) of the Covenant and the *Nationality Decrees* Opinion. No other plausible criterion, however, has yet been suggested to determine 'matters essentially within domestic jurisdiction'.

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[1] See Gross, 'The Charter of the United Nations and the Lodge Reservations', in *American Journal of International Law*, 41 (1947), pp. 538–44.

Nor can it legitimately be maintained, in regard to the Court's contentious jurisdiction, whatever may be the position in regard to the political jurisdiction of the United Nations under the Charter, that a reservation of 'matters essentially within domestic jurisdiction' leaves it to each individual State to decide for itself the matters within its domestic jurisdiction.[5] As Article 36 (6) of its Statute specifically provides that the Court shall be the arbiter of any disputed question of jurisdiction, it would require the most express and unambiguous language in a reservation to take the decision as to matters of domestic jurisdiction away from the Court and place it in the hands of the State concerned.[1] The position, it is thought, is the same in the case of treaties of arbitration in view of the general rule of international law that it is for an arbitral tribunal to interpret and apply the instruments relating to its jurisdiction. Only the most express and unambiguous words would take the decision out of the hands of the tribunal. In the argument in the *Interpretation of the Peace Treaties* Opinion the United States itself, in a passage cited on p. 139 below, strongly contended that a reservation of 'matters *essentially* within domestic jurisdiction' does not take the decision as to jurisdiction out of the hands of an arbitral commission.

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[1] See, on this point, Sir Gerald Fitzmaurice's address to the Court in the Advisory Opinion on the *Interpretation of the Peace Treaties: I.C.J.*, 1950: Pleadings, Arguments and Documents, pp. 314–18.

[2] See *supra*, pp. 110–11 and 120–1.

[3] See *infra*, pp. 139–40.

[4] The same view has frequently been expressed by States in debates in the General Assembly and Security Council.

[5] Kelsen, *The Law of the United Nations* (1950), p. 784, seems to think that this interpretation of the Charter and Statute is possible. But, in the present writer's opinion, he deduces too much from the mere omission in Article 2 (7) of the Charter of any provision specifying who is to decide questions of domestic jurisdiction. Cf. Kopelmanas, op. cit., pp. 241–2.

Imp.

Thus, so far as concerns the contentious jurisdiction of the Court and any other legal tribunal, a reservation of 'matters essentially within domestic jurisdiction' appears, in principle, to operate as a limit upon the tribunal's jurisdiction in much the same way as a reservation of 'matters which by international law are solely within domestic jurisdiction'.

The legal effect of the formula 'matters essentially within the domestic jurisdiction of the "X" State as determined by the "X" State'

The United States formula of the reserved domain in its declaration accepting the Court's compulsory jurisdiction has met with severe criticism, and not least in the United States itself.[2] The formula 'matters essentially within the domestic jurisdiction of the United States of America *as determined by the United States*' has been said to conflict with Article 36 (6) of the Statute which gives the 'determination' to the Court, to be in contradiction with the very purpose of compulsory jurisdiction, to 'smuggle a veto into the United States' acceptance of compulsory jurisdiction' and, in general, to set a disastrous precedent to other States calculated to undermine the Court's compulsory jurisdiction. But the question remains as to what is the actual legal effect of a domestic jurisdiction reservation in the United States form. The vital point is the compatibility of the reservation with Article 36 (6) of the Statute. During the Institute's examination of the reserved domain eminent authorities, including Judge Basdevant, expressed the opinion that a State's right, when accepting compulsory jurisdiction, to make a reservation in the form adopted by the United States is not open to challenge.[3] But these authorities appear to have looked at the question solely from the standpoint of the right of a State to invoke such a reservation as a defence against an attempt to bring it compulsorily before the Court. They do not appear to have considered the opposite question, whether a State which includes such a reservation in its declaration accepting the Court's compulsory jurisdiction is entitled to invoke that declaration as a valid declaration under the Optional Clause *for the purpose of bringing another State compulsorily before the Court.*

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[1] It is, no doubt, for this reason that the United States in the jurisdictional instruments referred to on pp. 125–6 *supra* added to its reservation of matters essentially within its domestic jurisdiction the words 'as determined by the United States of America'.

[2] E.g., Preuss in *American Journal of International Law*, 40 (1946), pp. 720–36; Hudson, ibid. 41 (1947), pp. 9–14; Wilson, *The International Law Standard in Treaties of the United States* (1953), p. 44.

[3] *Annuaire*, 43 (1950), Part 1, pp. 25, 27, and 29.

A State is not bound to accept the compulsory jurisdiction of the Court at all and, if it does so, the principle is well established that it is entitled to reserve particular disputes or classes of disputes from the jurisdiction conferred on the Court. Accordingly, a State seeking to bring another State compulsorily before the Court cannot be heard to contest the conditions by which the other State limited its acceptance of jurisdiction. It must take the acceptance of jurisdiction—whether in a treaty or in a declaration under the Optional Clause—as it stands. The most that it can do is to dispute the other State's interpretation of the terms in which its acceptance of jurisdiction is expressed and, under Article 36 (6) of the Statute, to submit the question of interpretation for decision by the Court. If the terms are clear, the other State cannot be brought before the Court compulsorily except in accordance with those terms. Therefore, the opinion of Judge Basdevant and others is plainly correct that the United States form of reservation in a declaration under the Optional Clause cannot be set aside so as to permit the bringing of the State concerned compulsorily before the Court in disregard of the reservation.

But it may seriously be questioned whether a declaration containing a reservation of matters of domestic jurisdiction in the United States form has any validity at all as a declaration under the Optional Clause. Article 36 (6) provides categorically:

> 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'

This provision applies no less to the jurisdiction conferred on the Court by declarations under Article 36 (2) of the Statute—the Optional Clause—than to the jurisdiction conferred on it by treaties under Article 36 (1). The United States reservation, by withdrawing questions of jurisdiction from the determination of the Court, appears to conflict with this provision and seems, therefore, on the face of it, irregular under the Court's Statute. If this is so, the question then is whether the Court would be strictly bound by the provision in Article 36 (6) of its Statute, if called upon to decide the regularity or otherwise of such a declaration under the Optional Clause. On this question certain pronouncements of the Permanent Court in the *Free Zones* case[1] appear to be pertinent. Articles 54 and 58 respectively of the Statute require the Court to deliberate in private and to give its judgment in open court. In the *Free Zones* case the Court was considering, in the light of those Articles, the validity of a request from both the parties that it should communicate to them unofficially the result of its deliberations and said:

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[1] *Free Zones of Upper Savoy and the District of Gex* (1929), *P.C.I.J.*, Series A, No. 22, p. 12.

> 'Whereas the spirit and letter of its Statute, in particular Articles 54 (3) and 58 do not allow the Court unofficially to communicate to the representatives of the two Parties to a case the "result of a deliberation" upon a question submitted to it for decision; *as, in contra-distinction to that which is permitted by the Rules, the Court cannot, on the proposal of the Parties, depart from the terms of the Statute.*'

At a later stage of the same case the Court went out of its way to reaffirm 'after mature consideration' the view which it had expressed in the above passage.[1] If the Court did not feel competent to sanction a departure from the terms of the Statute at the request of both parties to a case it would seem still less able to do so where the 'request' comes only from one party alone. It may be added that the Permanent Court reached its decision in the *Free Zones* case despite the absence of any provision either in the Covenant or the Statute that it was to 'function in accordance with the Statute'. The new Court, on the other hand, is bound by an express provision both in Article 92 of the Charter and Article 1 of the Statute requiring it to function in accordance with the Statute. Accordingly, if the United States form of reservation, as seems to be the case, is in conflict with the 'spirit and letter' of the Statute, it is arguable that the whole declaration in which such a reservation is contained *has no legal force as a declaration under the Optional Clause*. That such a reservation may produce this result was suggested by one eminent authority as long ago as 1930.[2] It may perhaps also be contended that a declaration containing such a reservation is valueless as a declaration under the Optional Clause on the simple ground that it is not a genuine 'recognition' of the compulsory jurisdiction of the Court.

If declarations which contain a reservation of matters of domestic jurisdiction in the United States form are indeed invalid as declarations under the Optional Clause, they would still be of some value as a basis for establishing the jurisdiction of the Court under the principle of the *forum prorogatum.*[3] The declaration would constitute a solemn statement of a willingness to submit to the Court matters not considered to be within domestic jurisdiction, and another State would be well justified, under Article 40 of the Statute and Article 32 (2) of the Rules, in basing a unilateral Application to the Court upon the declaration in the hope that the defendant State would accept jurisdiction.[1] Then, if the State which had made such a declaration proceeded to defend the case without raising any objection on the score of domestic jurisdiction, the jurisdiction of the Court would be established, but on the principle of the *forum prorogatum.* Similarly, if the State which had made a declaration containing such a reservation itself instituted proceedings by submitting an Application, the Application would not by itself suffice to seize the Court of the case but, if the other State proceeded to defend the case, the Court's jurisdiction would be established on the principle of the *forum prorogatum.*

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[1] (1932), Series A/B, No. 46, p. 161; see also p. 102.

[2] Lauterpacht, in *Economica*, 10 (1930), at p. 169.

[3] For the *Forum Prorogatum* jurisdiction, see the present writer's article in *International Law Quarterly*, 1 (1948), p. 377.

Superficially, it may appear that the practical results are much the same if a declaration in the United States form is regarded as a valid declaration under the Optional Clause. In that case, when another State institutes proceedings by Application, the establishment of the Court's jurisdiction will in practice depend on whether the defendant State invokes its right to withdraw the case from the Court by 'determining' it to be one concerning matters within its domestic jurisdiction. If it does not, the jurisdiction of the Court is technically to be regarded as having been established upon the submission of the Application, but, for practical purposes, the jurisdiction is only effectively established upon the defendant's non-use of its right to invoke the reservation. Similarly, when the State which has made a declaration in United States form itself institutes proceedings by Application, the other State, by reason of the right to reciprocity in regard to reservations, becomes entitled to withdraw the case from the Court by 'determining' it to be one concerning matters within its own domestic jurisdiction. Consequently, in this case also it is the non-use of the right to invoke the reservation which effectively establishes the jurisdiction of the Court.

It would, however, be a mistake to suppose that it makes no difference whether a declaration in the United States form is regarded as a valid or invalid declaration under the Optional Clause. Even when the State concerned is in the position of defendant, it cannot be said with certainty that the practical results are the same whether the declaration is held valid or invalid. There may well be a difference, for example, in regard to the right to obtain interim measures of protection, which probably does not exist when the plaintiff State's Application to the Court is manifestly insufficient by itself to establish jurisdiction. When the State concerned seeks, as plaintiff, to rely on such a declaration for the purpose of bringing another State compulsorily before the Court, the difference in practice between validity and invalidity becomes substantial. For it makes a very material difference whether the other State is entitled to decline jurisdiction simply on the ground that the plaintiff's declaration under the Optional Clause is a nullity or whether it must make a 'determination' as to the matters in dispute being considered to be matters of domestic jurisdiction. For the 'determination' of matters of domestic jurisdiction which a State makes on one occasion may be quoted against it on another occasion, and in regard to many matters the defendant State may feel very unwilling to make a determination of 'matters of domestic jurisdiction'. The more responsible a State's attitude towards international law, the more restricted it would be in its resort to the reservation. Indeed, it is one of the particular defects of the United States reservation that, owing to the subjective factor, the equality of obligation which is specifically provided for in the Optional Clause is more apparent than real. Worse, the balance is in favour of the less scrupulous State. However that may be, the distinction between the validity or invalidity of a declaration in the United States form is far from being an academic one when the State making such a declaration is the plaintiff in the case.

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[1] See *Corfu Channel* case (Preliminary Objection): *I.C.J.*, 1947–8, at p. 28. Cf. the unilateral Applications submitted by the United States against Hungary and the Soviet Union in regard to the *Treatment in Hungary of Aircraft and Crew of the United States of America: I.C.J.*, 1954, pp. 99 and 103.

One United States writer has maintained that the United States reservation of matters of domestic jurisdiction does not destroy the vitality of the United States acceptance of the Court's compulsory jurisdiction:[1]

> 'The fact remains that we are still bound to accept the Court's jurisdiction in the four important categories of cases listed in Article 36. It may safely be assumed that most disputes that arise will clearly be either domestic or international in character, and that no question about the jurisdiction of the Court will be raised. The veto, therefore, if one can call it a veto, is only a qualified one.'

This estimate appears seriously to underestimate the effect of the United States reservation, the very purpose of which is to empower the United States, at will, to withdraw a matter from the Court regardless of whether the Court might consider it to fall within one of the four categories of legal disputes listed in the Optional Clause. It is for this reason that the reservation strikes at the very heart of the system of compulsory jurisdiction laid down in Article 36 of the Statute. The United States declaration does not finally define *beforehand* the matters in regard to which it accepts jurisdiction; *it leaves the definition until after a case has arisen and then leaves it not to the decision of the Court but to its own choice*. The declaration thereby creates an illusion of compulsory jurisdiction but, the moment a case arises, the jurisdiction is seen to be voluntary on the part of the United States.[2] Nor does it seem possible to reconcile the United States declaration with Article 36 by adopting some form of intermediate solution under which the

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[1] Wilcox in *American Journal of International Law*, 40 (1946), p. 699, at p. 712.

[2] The majority of writers treat the United States' obligations resulting from its declaration as moral rather than legal; e.g. Quincy Wright in *American Journal of International Law*, 41 (1947), p. 452; Lissitzyn, *The International Court of Justice* (1951), p. 65.

United States would be held bound in regard to all matters manifestly within international jurisdiction but would remain free to decide for itself in all other matters. The unambiguous meaning of the United States reservation—and the debates in the Senate leave no doubt that this was the intention—is that the United States reserves to itself an absolutely general right to insist, in any given case, upon its own determination of the matters considered to be within its domestic jurisdiction and to decline jurisdiction with respect to such matters.[1]

Accordingly, it is believed that, if the validity of the United States form of declaration under the Optional Clause is challenged before the Court by another State, the Court would be fully justified in declaring it incompatible with the Statute. That the Court should take this position also seems desirable on grounds both of policy and of equity. As to policy, the United States form of declaration enables a State to maintain the façade of having accepted compulsory jurisdiction without in fact committing itself finally to submit to jurisdiction in any given case. The reservation, if copied by many States and if widely introduced into treaties of arbitration, must gravely prejudice the growth of the genuine system of compulsory jurisdiction which has developed under Article 36 of the Statute. As to equity, the United States form of declaration, if accepted as valid under the Optional Clause, is calculated, for the reason previously explained, to produce in practice an inequality of obligation among the States which have made declarations under the Optional Clause. It enables the State which uses that form, *while not committing itself to anything in advance*, to derive what advantage it can from the declarations of other States under the Optional Clause. It enables that State, without giving any undertaking itself to submit to jurisdiction in a future case of a similar kind, to force another State into Court unless it is prepared to make what may be a distasteful and impolitic determination that the matters in dispute are within its domestic jurisdiction. It seems *pessimi exempli* to uphold the validity of a declaration which is specious as an acceptance of jurisdiction and which produces such a result.[2]

What has been said in regard to declarations under the Optional Clause applies in large measure to arbitration treaties containing a domestic jurisdiction reservation in the United States form. The objection on the score of inequality of obligation is less to the extent that in a treaty both parties have a hand in introducing the reservation.[1] But the incompatibility with the Statute is the same. Accordingly, it is believed that the right view of any such treaties—and fortunately they are not, as yet, very numerous—is that they provide a basis for establishing the jurisdiction of the Court subsequently on the principle of the *forum prorogatum* but do not by themselves suffice to confer compulsory jurisdiction on the Court under Article 36 (1) of the Statute.

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[1] See Preuss, loc. cit., pp. 727–31.

[2] This is not to suggest that the United States, whose record in the sphere of international arbitration is as good as that of any other State, is likely to be irresponsible in its use of the reservation. The point is that the legal position created by the reservation is profoundly unsatisfactory. The lack of consistency which affects international jurisdiction when subjective reservations are made is, indeed, illustrated by the United States reservations to the Pact of Bogotá. On the one hand, it insisted on the right to determine the scope of its own domestic jurisdiction; on the other, it objected—however legitimately—to Article VII under which the treatment of aliens, apart from denial of justice, was made a matter of domestic jurisdiction.

The jurisprudence of the International Court of Justice in regard to matters of domestic jurisdiction

The jurisprudence of the new Court does not, as yet, throw much fresh light on the points discussed in the present paper. The plea of domestic jurisdiction has been raised in one contentious case, the *Anglo-Iranian Oil Co.* case,[2] and in one Advisory Opinion, the *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania.*[3] At the actual hearing of the preliminary objection in the *Anglo-Iranian Oil Co.* case the Court, as previously mentioned, decided in favour of Iran on another point and made no pronouncement on the issue of domestic jurisdiction. At a previous hearing, however, when it considered the United Kingdom's request for an indication of interim measures of protection, the Court did advert briefly to the question of domestic jurisdiction.[4]

> 'Whereas the complaint made in the Application is one of an alleged violation of international law by the breach of the agreement for a concession of April 29, 1933, and by a denial of justice which, according to the Government of the United Kingdom, would follow from the refusal of the Iranian Government to accept arbitration in accordance with that agreement, *and whereas it cannot be accepted a priori that a claim based on such a complaint falls completely outside the scope of international jurisdiction.*'

The Court was there dealing with a question preliminary even to the hearing of Iran's preliminary objection and seems to have adopted a course analogous to that adopted by the Permanent Court in the *Nationality Decrees* Opinion.[5] It made a *provisional finding* on the question whether the United Kingdom's case contained any submissions arguably within international jurisdiction. As the circumstances were somewhat special, it would probably be wrong to read too much into the language in which the Court expressed this provisional finding. It does, however, appear that, faced with a domestic jurisdiction reservation drawn in accordance with the Covenant formula, the Court considered that even a minimal international element would suffice to support a *provisional* finding in favour of international jurisdiction.

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[1] Nevertheless the obligation in the United States economic aid treaties appears to be entirely one-sided because the domestic jurisdiction reservation applies only on the United States side; see, for example, the Agreement with Spain; *Year Book of the International Court of Justice*, 1953–4, p. 246.

[2] Order of 5 July 1951: *I.C.J.*, 1951, p. 89.

[3] *I.C.J.*, 1950, p. 65.

[4] At pp. 92–93.

[5] See *supra*, pp. 107–11.

The circumstances of the Court's pronouncement in the *Peace Treaties* Opinion were also somewhat special. The General Assembly had under consideration accusations made against Bulgaria, Hungary and Roumania of violations of human rights. Noting that the Treaties of Peace with these countries contained specific provisions in regard to the observance of human rights and that certain of the Allied Powers were charging the three countries with breaches of the Treaties, the General Assembly requested an Advisory Opinion on certain questions concerning the application of an arbitration clause contained in each of the Treaties. Objection was, however, taken by the three States, and by some other States closely allied with them, to the Court's jurisdiction to give an Opinion on the ground that the Request for an Opinion concerned 'matters essentially within the domestic jurisdiction' of the three States and that the Court was incompetent, under Article 2 (7) of the Charter, to give the Opinion. The Court, first, pointed out[1] that it had not been asked by the General Assembly to consider the charges against the three States nor even to interpret the human rights clauses of the Peace Treaties. It had been asked only for 'certain clarifications of a legal nature' regarding the applicability of the procedure for settlement of disputes laid down in those treaties. It then said:[2]

> 'The interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law, which by its very nature, lies within the competence of the Court.
>
> 'These considerations also suffice to dispose of the objection based on the principle of domestic jurisdiction and directed specifically against the competence of the Court, namely, that the Court as an organ of the United Nations, is bound to observe the provisions of the Charter, including Article 2 (7).'

The above pronouncement is in line with the jurisprudence of the Permanent Court referred to earlier in this article,[3] which consistently rejected the idea that the interpretation and application of a treaty can be a matter of domestic jurisdiction. But the International Court of Justice carefully limited its pronouncement to the particular point at issue, the application of the 'disputes' clauses of the Peace Treaties, and not much assistance can therefore be derived from it as to the Court's general views concerning the meaning of the formula 'matters essentially within domestic jurisdiction'. Similarly, the reference to Article 2 (7) of the Charter is too slight to form the basis of any conclusion as to the applicability of Article 2 (7) to the Court's advisory jurisdiction and still less to its contentious jurisdiction.

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[1] At p. 70.

[2] Ibid.

[3] See *supra*, pp. 110–11 and 120–1.

If the Court confined itself narrowly to the point whether interpretation of the 'disputes clauses' in the Peace Treaties could be considered 'matters essentially within domestic jurisdiction', this was by no means the case with the United States in the observations which it addressed to the Court. Having regard to the special part played by the United States in introducing Article 2 (7) into the Charter, its observations submitted in the *Peace Treaties* Opinion have a particular interest and, as previously intimated, they support the view taken in the present article of the legal effect of the formula of the reserved domain contained in Article 2 (7). The United States did not content itself with examining the position of the Court in giving an opinion concerning the 'disputes clauses'. It also examined what would be the position of the Arbitral Commissions to be set up under the Peace Treaties, if they were confronted with an objection that the disputes concerned matters of domestic jurisdiction. The United States first emphasized that the 'determination' would be for the Commissions, not for the States in question:

> 'Even if the Peace Treaties expressly provided that their provisions should not be construed to affect matters which are solely or *essentially* within the domestic jurisdiction of any State, these States could not by unilateral declaration determine for themselves that matters were solely within their domestic jurisdiction. *In event of dispute, the issue whether a matter was or was not essentially of domestic jurisdiction would be subject to settlement by the Treaty Commissions.*'[1]

The United States then proceeded to examine the critical question whether the observance of a treaty stipulation in regard to human rights can be a 'matter *essentially* within domestic jurisdiction':

> 'But it should be remembered that there are no provisions in the Peace Treaties and no principles of International Law which qualify or limit the character of the human rights clauses as international obligations and exempt them from the jurisdiction of the Treaty Commissions. There are no principles of international law and no provisions of the Charter which could prevent international adjudication under appropriate circumstances, whether by this Court or any other international tribunal, of the substantive rights and duties of parties under a treaty in regard to matters covered by a treaty *simply because, in the absence of a treaty, such matters would be deemed within the domestic jurisdiction of sovereign States.*
>
> 'Art. 2 (7) of the Charter places no limitation on the treaty-making power of sovereign States. *Certainly as between the parties, matters expressly covered by treaties cannot be considered matters essentially of domestic jurisdiction and concern.* . . . By becoming parties to treaties States usually undertake international obligations which limit their otherwise sovereign right to decide for themselves what they will or will not do. That is the normal purpose and effect of a treaty. *States which enter into solemn international treaties to secure human rights and fundamental freedoms to persons within their jurisdiction cannot escape their obligations on the ground that such matters are essentially of domestic concern.*

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[1] *Pleadings, Oral Arguments, Documents*, p. 278, statement by Mr. Cohen. (Italics are the writer's.)

'These principles have been consistently maintained by the Permanent Court of International Justice.'[1]

The United States then referred to a number of relevant pronouncements of the Permanent Court concerning the reserved domain, apparently treating them as equally applicable to the reserved domain as conceived in the formula 'matters essentially within domestic jurisdiction'. It is also to be observed that the United States did not allow the omission from the Charter formula of the words 'by international law' to prevent it, in arguing before the Court, from examining the problem of the reserved domain entirely with reference to the criterion of international law.

Conclusions

The following are the main conclusions which emerge from the foregoing examination of the doctrine of the reserved domain in international legal tribunals:

(1) The classical and fundamental meaning of the reserved domain of matters of domestic jurisdiction is the domain of matters in regard to which the exercise of the jurisdiction of the State concerned is not regulated by international law. The reserved domain, as a constitutional doctrine, does not therefore establish in regard to defined categories of matters a fixed distribution of powers between international jurisdiction and the reserved jurisdiction of the individual State. The boundary of the reserved domain of each State alters with every development in general international law. It also contracts or expands for each State according to the particular international obligations and, especially, treaty obligations from time to time undertaken by that State (the *Nationality Decrees* Opinion).

(2) Under the classical concept, the reserved domain is as much concerned with the substantive rights and obligations of States under international law as with the boundary between international and State jurisdiction. Indeed, the question of the reserved domain under the classical concept is identical with the question of liability or no liability under international law.

(3) Accordingly, before a legal tribunal bound to decide in accordance with the legal rights of the parties a defendant State may always raise the plea of the reserved domain as a substantive defence to the plaintiff's claim. Whether it may also raise the plea as an objection to jurisdiction depends upon the terms of the instrument conferring jurisdiction on the particular tribunal. It requires an express or implied reservation of matters of domestic jurisdiction in the instrument to enable the reserved domain to be pleaded as an objection to jurisdiction.

(4) While the erection of the reserved domain into a constitutional limit

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[1] *Pleadings*, &c., p. 278. (Italics are the writer's.)

upon international jurisdiction may be relevant in the case of international political organs not bound to decide in accordance with the legal rights of the parties, it creates an entirely artificial position in international legal tribunals. If the matter is within the reserved domain, the tribunal is incompetent to investigate the merits at all. Yet it cannot determine whether or not the matter is within the reserved domain without an investigation of the merits.

(5) If a preliminary objection is made to its jurisdiction on the ground of the reserved domain, the Court seeks in the preliminary proceedings to solve the difficulty by investigating the merits to the extent necessary to arrive at a provisional finding as to whether or not the plaintiff's case discloses any arguable matter of international obligation (the *Nationality Decrees* Opinion).

(6) Unless it is absolutely clear on a provisional examination of the claim of the plaintiff State whether or not it discloses arguable matter of international obligation, the modern practice of the Court is not to decide the objection to jurisdiction in the preliminary proceedings but to join the question of jurisdiction to the merits. It will then, in its subsequent judgment on the merits, deal with the objection to jurisdiction and, if it upholds the objection, will not examine the merits any further.

(7) The Charter formula of the reserved domain, 'matters essentially within domestic jurisdiction', does not, as such, apply to the contentious jurisdiction of the Court which is derived from the consent of the parties given in other instruments. Whether or not it applies in any given case, therefore, depends on whether it appears in the particular instrument or instruments on which the Court's jurisdiction is sought to be established in that case.

(8) The meaning and effect of the Charter formula, as a reservation from jurisdiction conferred on legal tribunals, must be regarded as uncertain in the absence of any clear-cut judicial pronouncement. But, although the United States may have aimed in 1945 at fixing the content of the reserved domain by reference to general, as distinct from particular, international law, it seems that, at any rate in legal tribunals, the actual effect of the Charter formula, owing to all treaty obligations being matters of international jurisdiction, may not be very different from the effect obtained by applying the classical doctrine of the reserved domain. This view of the Charter formula was acted on by the United States itself in the *Interpretation of the Peace Treaties* Opinion.

(9) There is no basis for saying that the Charter formula by itself places the determination of matters of domestic jurisdiction in the hands of the State concerned and takes the decision as to its jurisdiction away from the Court.

(10) The special United States form of reservation, 'matters essentially within domestic jurisdiction as determined by the United States', appears to be incompatible with the Statute of the Court. If so, the result is to invalidate the whole submission to jurisdiction in the instrument, not the reservation by itself. In consequence, instruments containing such a reservation appear to provide a basis for establishing jurisdiction on the principle of the *forum prorogatum* but no more.

In general, it seems that the doctrine of the reserved domain, as a limit upon the jurisdiction of legal tribunals, is both artificial and destructive of the avowed object of the acceptance of their jurisdiction. For it confuses jurisdiction with substantive rights and obligations. It tends to give an air of respectability to what is nothing more than a refusal to allow international obligations to be judicially enforced by a spurious appeal to a constitutional doctrine. If given wide scope it tends to emasculate the vital principle of international law that a State may not plead its own domestic law—including its constitutional law—as an excuse for not performing its international obligations. The *Nationality Decrees* Opinion, by insisting that the reserved domain begins where international law ends, brought these evil tendencies under control. It is devoutly to be hoped that the new Court, by declaring, when occasion arises, the incompatibility of the United States form of reservation with the Statute and by refusing to surrender treaty obligations to the reserved domain under the Charter formula, may largely hold the ground won by the Court in that justly renowned Opinion.

THE SCOPE OF ACQUIESCENCE IN INTERNATIONAL LAW

By I. C. MacGIBBON, M.A., LL.B. (EDINBURGH)

Meaning of the term 'acquiescence'

Acquiescence, in the accepted dictionary sense of tacit agreement or consent, is essentially a negative concept. In the present article it is used to describe the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights: it is not intended to connote the forms in which a State may signify its consent or approval in a positive fashion. Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.

The scope of the doctrine of acquiescence

Rights which have been acquired in clear conformity with existing law have no need of the doctrine of acquiescence to confirm their validity. However, the line which divides conduct which international law permits from that which it prohibits is in many cases not susceptible of precise delimitation. A course of action which in one period may have been expressly prohibited may, by dint of its continued repetition coupled with the consent of other States, be acceptable under the rules obtaining in a later period. It is not surprising that, in a system of law which is not fully developed, the extent to which a novel practice may be regarded as being in conformity with existing law should be unpredictable. In the absence of a satisfactory compulsory procedure for authoritative judicial ascertainment the legality of such practices may depend upon the measure in which they enjoy the express approval of other States, or, in the course of time, their acquiescence. Tribunals may be called upon to resolve the conflict inherent in the rival claims to consideration of the maxims *ab injuria jus non oritur* and *ex factis jus oritur*. It is the purpose of this article to indicate the circumstances in which the doctrine of acquiescence may assist in this reconciliation.

Acquiescence operates in the sphere to which the maxim *ex injuria jus non oritur* is least applicable, that is, where the vindication of a claim or course of action depends on the consent of the States affected. The presumption of consent which may be raised by silence is strengthened in proportion to the length of the period during which the silence is maintained. The passage of time is an essential element in prescriptive and historic rights; in the formation of rules of customary international law it is not necessarily so decisive a factor. Although the relation of acquiescence to customary law is discussed below,[1] the present inquiry is mainly concerned with its function in the law of prescriptive and historic rights.[2]

I. *Nature and general function of acquiescence*

Validity of tacit consent

It has occasionally been maintained that the effectiveness of consent is vitiated if the consent be tacit or passive. Such an assertion amounts to a denial of the validity of any doctrine of acquiescence in the strict sense; that is, a denial that an illegal act or one of doubtful legality can be cured by anything short of positively expressed approval on the part of interested and affected States.[3] For Fauchille, acquiescence means express consent, and he was in some doubt as to the propriety of implying the consent of States simply from their inaction.[4] He quotes Perels to that effect without comment.[5] Similarly, Professor Ross, who mentions consent first among the circumstances which 'exclude the normal illegitimacy of an act', emphasizes the qualification that 'in all cases . . . there should be real consent and not merely passivity in the face of inevitable facts'.[6]

A similar view is reflected in a forcefully written Opinion of the Queen's Advocate (Harding) given in the course of the dispute between Great Britain and Spain over the Cuban 'Cays'. He wrote:

> 'I am wholly unaware of the Spanish "Royal Order of the 8th July, 1859", alluded to by Senor Collantes: but his attempt to rely on this Order for proof that this limit has been conceded, merely because no nation has "reclaimed upon this point" (i.e. I presume because no Nation formally protested against the Order) is in my opinion preposterous. It is obviously not competent for one Nation, merely by its own authority to appropriate to itself any portion of that which is open and common to all; or to make any alteration in derogation of the common law and usage of Nations; other Nations have not sanctioned nor consented to this claim; "*non placuit gentibus*".'[7]

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[1] See pp. 150 ff.

[2] See below, pp. 152 ff.

[3] Professor (now Judge) Lauterpacht has not gone quite so far. He has limited this contention to the class of acts 'so patently at variance with general international law as to render [them] wholly incapable of becoming the source of a legal right' or 'so tainted with nullity *ab initio* that no mere negligence of the interested state will cure it' (in this *Year Book*, 27 (1950), pp. 397, 398).

[4] *Traité de droit international public* (8th ed., 1925), vol. i, part 2, p. 382.

[5] *Manuel de Droit Maritime International* (French translation by Arendt, 1884), p. 44: 'L'exercice unilatéral de prétendus droits, même quand il ne soulève pas les réclamations d'autres états, soit par connivence, soit par impuissance de résister, ne peut jamais être opposé à ceux qui n'ont pas acquiescé expressément ou par des actes dont l'intention est évidente.'

[6] *A Textbook of International Law* (1947), p. 243. See also the decision in 1915 of the Imperial Supreme Prize Court in Berlin in the case of *The Elida* (translated in *American Journal of International Law*, 10 (1916), pp. 916 ff.). Discussing the question of the permissibility of extensions of national waters by unilateral national legislation, the Court concluded that such claims were founded 'not so much upon the independent regulation by the single State, as upon the supposition of a tacit acknowledgment of such an extension by the other States. . . . A mere failure to object, however, is not identical with a positive concurrence of the nations' (ibid., p. 918).

[7] Opinion of 11 November 1859: F.O. 83/2371: quoted in Smith, *Great Britain and the Law of Nations* (1932), vol. ii, p. 230.

A more recent expression of this view is contained in a Note, dated 7 April 1951, written by the French Government in reply to a request by the United Kingdom for a statement of its position in regard to the claims of various States to extend their territorial waters beyond the generally accepted limits by means of unilateral legislative acts. The French Note runs, in part, as follows: 'Aucun État ne peut, par une déclaration unilatérale, étendre sa souveraineté sur la haute mer et rendre cette annexion opposable aux pays qui ont le droit d'invoquer le principe de la liberté des mers, tant que ces derniers ne l'auront pas formellement acceptée. Une renonciation à une règle de droit international établie dans l'intérêt de la communauté des nations ne peut pas se présumer.'[1] In so far as these views deny the relevance and legal effect of acquiescence in the form of absence of protest they run counter to the general current of opinion both past and present,[2] as will be suggested hereafter.

(*a*) *The general function of acquiescence*. The function of acquiescence may be equated with that of consent, which was described by Professor Smith as 'the legislative process of international law';[3] it constitutes a procedure for enabling the seal of legality to be set upon rules which were formerly in process of development and upon rights which were formerly in process of consolidation. The primary purpose of acquiescence is evidential; but its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which is both objective and practical. The interpretative function of acquiescence and the part it plays as an element in the concept of estoppel are discussed below.[4] Apart from these and other considerations which are set out more fully hereafter, the significance of acquiescence has been expressed in various ways: it has been interpreted as justifying the assumption that, to the acquiescent States, 'there is nothing shocking to the general legal conscience';[5] more positively, as providing 'evidence of the essential conformity of [a] new practice with the principles of international law';[6] as implying recognition of a *de facto* situation, although not *de jure* recognition of the annexation which preceded it;[1] as constituting an admission;[2] as establishing an unfavourable precedent;[3] and as inviting further encroachment on the rights of the acquiescent State.[4]

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[1] Printed in the *Fisheries* case, *Pleadings*, vol. iv, p. 605.

[2] See, e.g., Anzilotti, *Cours de droit international* (French translation by Gidel, 1929), p. 348: 'La simple manière de se comporter d'un État, y compris, dans des circonstances déterminées, même son seul silence, peut signifier la volonté de reconnaître comme légitime un état de choses donné. Naturellement des considérations politiques induisent souvent les États à préférer cette voie à celle d'une reconnaissance explicite.' And see the Russian *Memorandum* to Great Britain in the *Alaska* dispute between Great Britain and Russia, which contained the following comment on the British failure to protest against Russian claims: 'La Russe étoit donc pleinement autorisée à profiter d'un consentement, qui, pour être tacite, n'en était pas moins solennel . . .' (quoted in Smith, op. cit., vol. ii, p. 5).

[3] Op. cit., vol. i, p. 13.

[4] See pp. 146–7.

[5] *Secretariat Memorandum on the Régime of the High Seas* (14 July 1950), United Nations (General Assembly) Doc. A/CN.4/32, p. 60.

[6] See Lauterpacht in this *Year Book*, 27 (1950), p. 395.

(*b*) *Acquiescence as an element of interpretation.* Evidence of the subsequent actions of the parties to a treaty may be admissible in order to clarify the meaning of vague or ambiguous terms. Similarly, evidence of the inaction of a party, although not conclusive, may be of considerable probative value. It has been said that '[the] primary value of acquiescence is its value as a means of interpretation'.[5] The failure of one party to a treaty to protest against acts of the other party in which a particular interpretation of the terms of the treaty is clearly asserted affords cogent evidence of the understanding of the parties of their respective rights and obligations under the treaty.[6] The influence of acquiescence may similarly be observed in the assumption by international organizations of functions for which their constituent instruments provide no warrant. Dr. Jenks drew attention to the practice of the International Labour Office of interpreting the texts of conventions adopted by the International Labour Conference, although the Constitution of the International Labour Organization assigned this task to the Permanent Court of International Justice. He cited part of a Memorandum submitted to the Governing Body by the International Labour Office in October 1921, which contains the following passage:

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[1] See Memorandum, dated 9 June 1936, by the Chief of the Division of Near Eastern Affairs in the United States Department of State, which contains this passage: 'It might be argued, therefore, that our failure to protest the recent Italian decree extending Italian jurisdiction over American nationals (and other foreigners in Ethiopia) or its application to American nationals would *not* constitute *de jure* recognition of the Italian annexation of Ethiopia. However, our failure to protest might be interpreted as a recognition of the *de facto* conditions in Ethiopia' (*Foreign Relations of the United States*, 1936, vol. iii, p. 241).

[2] On the death of Pope Pius IX, the Law Officers of the Crown were asked to advise whether there was any legal objection to an acknowledgement by the Secretary of State of letters addressed to the Queen by the College of Cardinals and the new Pope. The Law Officers considered that an acknowledgement might properly be sent, but they issued this warning: 'In the Pope's letter there are two expressions, "supreme Pontificate" and "Catholic Church" to which we would call your Lordship's attention, since we think the answer should be so framed as not to admit, even by silence, the claim of the Pope to Supreme Pontificate. . . . In reference to the Cardinals' letter, the like observations apply to the expressions "Catholic Church", "Supreme Pastor", and "Apostolic See". And in the answer we suggest that words should be used carefully avoiding the recognition of those titles or descriptions' (Report of the Law Officers, dated 2 March 1878).

[3] The United States Secretary of State, in instructions, dated 25 July 1936, to the American Chargé d'Affaires in Switzerland (*Foreign Relations of the United States*, 1936, vol. ii, pp. 805–7), urged him to press for exemption for American goods from Swiss Customs Regulations imposing a stamp tax on payment of import duties. Admitting that the tax did not discriminate against the United States, the Secretary of State added: 'However, it is felt that, if a violation of the agreement is allowed to go unchallenged in this instance, a precedent may be established for the levying of further taxes . . . which might have the effect of nullifying the concessions in the trade agreement' (ibid., p. 807). And see ibid., 1933, vol. v, pp. 6–9.

[4] The United States Chargé d'Affaires in Moscow, in a dispatch, dated 21 February 1938, to the Secretary of State concerning the increased strictness with which Soviet Customs Regulations were being enforced, wrote: 'If, therefore, the American Government and other governments maintaining diplomatic missions in Moscow permit without protest curtailments of the courtesies accorded by Soviet Customs officials to their diplomatic representatives, new and more serious curtailments of such courtesies may be expected in the future . . .' (*Foreign Relations of the United States: the Soviet Union*, 1933–9, p. 639). See also *Foreign Relations of the United States*, 1935, vol. ii, pp. 515–16.

[5] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 619. And see ibid., p. 556, where counsel for the United States insisted 'that the doctrine of acquiescence is a substantive element in international law, and under that doctrine of acquiescence you can inquire into every subsequent fact which is pertinent to the issue, showing the intent of the Parties by their subsequent acts'.

[6] In the case of *Pigeon River Improvement, Slide and Boom Company* v. *Charles W. Cox, Limited* (1934), 291 U.S. 138, the question whether the imposition of tolls for the use of certain works constructed in Pigeon River, a boundary stream between the United States and Canada,

> 'More recently it has happened that the same point of interpretation has been raised by more than one Member of the Organisation. In these cases the Office has been able to point out that when the point was previously raised and it was consulted thereon, the information supplied by it and the conclusion to which it appeared to lead had been accepted by the Member in question and had given rise to no objection after publication in the *Official Bulletin*. The process of the development of international law is, in fact, an exactly similar process, and the tacit acceptance of an interpretation acted on by a Member and communicated through the *Official Bulletin* constitutes important authority which can always be invoked for that interpretation.'[1]

(*c*) *Acquiescence as an estoppel*. The growing frequency with which use is made of arguments based upon the principle of estoppel affords a valuable indication of the extent to which the doctrine of acquiescence itself constitutes a precept for equitable conduct in which considerations of good faith are predominant.[2] Although some thirty years ago there may have been some justification for a certain hesitancy in invoking the concept of estoppel in the sphere of international law,[3] modern opinion is tending to

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was a violation of the Webster–Ashburton Treaty of 1842, was decided by the United States Supreme Court by reference to the 'practical construction' placed by the parties upon the ambiguous provisions of the treaty and which consisted of their failure to protest when the works were constructed and when charges were made for their use. See also the *Russian Indemnity* case of 1912 between Russia and Turkey (Scott, *The Hague Court Reports* (1916), pp. 297 ff.).

[1] See this *Year Book*, 20 (1939), p. 133.

[2] Judge Lauterpacht has indicated (in this *Year Book*, 27 (1950), pp. 395–6) the way in which the absence of protest may in itself become a source of legal right in relation to estoppel or prescription. The far-reaching effect of failure to protest 'is in accordance with equity', he wrote, 'inasmuch as it protects a State from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States' (ibid., p. 396). See the Award in the *Grisbadarna Arbitration* of 1909, translated in *American Journal of International Law*, 4 (1901), pp. 233 ff.

[3] See, e.g., Sir Arnold (now Lord) McNair in this *Year Book*, 5 (1924), at pp. 34–37, where he discussed the nature and scope of estoppel in international law. Notwithstanding the dearth of authority upon this problem, he concluded that an international tribunal could hardly fail to be unfavourably impressed by evidence that a State had been inconsistent in its attitude. He found evidence of the existence of such a tendency in the fact that the Arbitrators in the *Fur Seal Arbitration* (Moore, *International Arbitrations*, pp. 755 ff.) expressly found against the United States allegation that Great Britain had conceded the claim of Russia to exercise exclusive jurisdiction over the seal fisheries in the Behring Sea outside territorial waters, being fortified in this conclusion by the fact that the United States, as well as Great Britain, had protested against the Russian Ukase of 1821 in which these claims were advanced. 'This is not estoppel *eo nomine*.' Sir Arnold McNair wrote, 'but it shows that international jurisprudence has a place for some

elevate the concept of estoppel to the rank of one of the 'general principles of law recognized by civilized nations'. The principle of estoppel featured in the jurisprudence of the Permanent Court of International Justice in the case of the *Serbian Loans*[1] and, more prominently, in the case concerning the *Legal Status of Eastern Greenland*.[2] The principle was also recognized, although not applied, in the Award in the *Tinoco Arbitration* between Great Britain and Costa Rica.[3]

The main obstacle to the acceptance of the concept of estoppel as a principle of international law may well have been the long-prevalent belief that it was a technical rule of evidence and, therefore, unsuited to the 'rough jurispsudence of nations'. The changing climate of opinion may be gauged from the reconsideration given to the nature of estoppel by the Judicial Committee of the Privy Council in *Canada and Dominion Sugar Company, Limited* v. *Canadian National* (*West Indies*) *Steamships, Limited*.[4] The Board quoted with approval Sir Frederick Pollock's description of the doctrine of estoppel as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence',[5] and went on to state: 'Estoppel is often described as a rule of evidence, as, indeed, it may be so described. But the whole concept is more correctly viewed as a substantive rule of law.'[6] The tribunals before which the doctrine was canvassed accepted it by implication and without comment, approaching the solution of the problem concerned in the way in which counsel had presented it to them. The doctrine has been invoked in varying forms over a period of a century and a half and although there have been occasions on which it has been held to be inapplicable to the facts its jurisprudential basis has been unchallenged.[7]

recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est*' (this *Year Book*, 5 (1924), p. 35).

[1] *P.C.I.J.*, Series A, Nos. 20/21, pp. 38–39. The principle was approved by the Court but the circumstances were not such as to warrant its application. The Court pointed out that 'no sufficient basis has been shown for applying the principle' of estoppel, and drew attention to the lack of constituent elements of estoppel, noting the absence of any 'clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied' and of any 'change in position on the part of the debtor State.' (Ibid., p. 39.)

[2] *P.C.I.J.*, Series A/B, No. 53. Norway maintained that the attitude of Denmark when seeking recognition of her position in Greenland from other States between 1915 and 1921 was inconsistent with the possession of sovereignty at that time and that Denmark was therefore estopped from alleging a long-established sovereignty over the whole of Greenland (ibid., p. 45). The Court, however, found that the circumstances provided no ground for holding Denmark thus estopped (ibid., p. 62). The Court observed that by accepting as binding several treaties 'Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty . . .' (ibid., pp. 68–69). The Court further said: 'It follows that, as a result of the understanding involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and, *a fortiori* to refrain from occupying a part of Greenland' (ibid., p. 73).

[3] See *American Journal of International Law*, 18 (1924), pp. 155–7.

[4] [1947] A.C. 46.

[5] Ibid., p. 55.

[6] Ibid., p. 56.

[7] The United States argued in the *Chamizal Arbitration* that Mexico was estopped from

In the dispute between Great Britain and the United States concerning the *Title to Islands in Passamaquoddy Bay*, the concluding passage of the case of Great Britain observed that, in view of the silence of the United States with regard to the island of Grand Manan for some twenty-three years, and the admission by the United States of the fact of British settlement and jurisdiction over the island during that period, 'It may admit of some doubt whether this profound silence . . . ought not now to preclude all further claim to it on their part, even though their pretensions might originally have had some foundation';[1] and the doubt was supported, the case continued, by the principle laid down by the Agent for the United States in his argument before the Commissioners under Article IV of the Treaty of 1794 (the Treaty of Ghent), in which he contended that, had the State of Massachusetts remained silent spectators of the improvements made upon the British Settlement on territory claimed by the United States, that would have indicated that the State of Massachusetts had no claim to the territory.[2]

An extract from the draft of a letter[3] from Earl Granville to Musurus Pasha in 1884 referring to the disputed right of a British shipping company to operate vessels on the Tigris and Euphrates, in the context of a disagreement concerning the terms of the Agreement of 1846 concerning general rights of navigation, employs a similar argument. The right was claimed by virtue of the terms of a Vizirial letter of 1861. Earl Granville pointed out that the company had enjoyed that privilege ever since 1861 with the knowledge and acquiescence of the Porte. The absence of protest during that period showed, according to Earl Granville, that the attitude of the Porte had not been, as alleged by Musurus Pasha, one of friendly tolerance,[4] but one of acquiescence in a claim of right on the faith of which the company had made large capital investments. 'Whatever may be the true construction of the Agreement of 1846 as to the general right of navigation', the letter adds, 'Her Majesty's Government consider that the attitude of the Porte during the last twenty-two years debars them from now disputing the validity of the rights claimed and exercised by the Company under the

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asserting title by reason of the long 'undisturbed, uninterrupted, and unchallenged possession' of the disputed territory by the United States. Since it was held that in the circumstances of the case the failure of Mexico to protest did not amount to acquiescence, the question of the application of the doctrine of estoppel did not directly arise. Its validity, however, was not questioned by Mexico or by the Commissioners. (The Award is printed in *American Journal of International Law*, 5 (1911), pp. 785 ff.)

[1] See Moore, *International Adjudications* (Modern Series), vol. vi, p. 195.

[2] See below, p. 162.

[3] Quoted in McNair, *The Law of Treaties* (1938), pp. 49–50.

[4] The dissenting Judges in the case concerning *Rights of Nationals of the United States in Morocco* held similarly that the conduct of the French Government which knew of the United States claim to exercise capitulatory rights, and, in spite of their knowledge, continued the old practice without any reservation, was not due merely to 'gracious tolerance' (*I.C.J. Reports*, 1952, p. 221).

Vizirial letter of 1861, and that they are entitled to insist on the status quo of the Company being maintained. . . .'[1]

In the course of the correspondence respecting the boundary between Venezuela and British Guiana, part of which was incorporated in the Venezuelan Argument, the United States Secretary of State,[2] Olney, dismissed British claims to have established title to the disputed territory on the basis of the settlements made by British subjects in the belief that the territory was British, on the ground that the British and not the Venezuelan Government had perpetrated and encouraged that belief, and that it was simply a matter between the persons concerned and the British Government. The Secretary of State concluded: 'In but one possible contingency could any claim of that sort by Great Britain have even a semblance of plausibility. If Great Britain's assertion of jurisdiction, on the faith of which her subjects made settlements on territory subsequently ascertained to be Venezuelan, could be shown to have been in any way assented to or acquiesced in by Venezuela, the latter Power might be held to be concluded and to be estopped from setting up any title to such settlements.'[3]

A similar argument was advanced by the Norwegian Government in the *Fisheries* case; and Judge McNair, although not prepared to hold that the conduct of the United Kingdom amounted to acquiescence, approached the problem in the same way by posing the question whether, supposing the system of delimitation adopted by Norway capable of being recognized as lawful, 'the United Kingdom had precluded herself from objecting to it by acquiescing in it'.[4]

(*d*) *The relevance of acquiescence in the development of rules of customary international law.* Despite the lack of emphasis on the length of time necessary for the formation of a customary rule, the nature of the case suggests that some considerable time may elapse between the initiation of a usage, its growth into a general practice and its final acceptance as law. Although, as one authority[5] put it, 'customary international law is not yet another expression for prescription', prescriptive and customary rights share a common process of development which involves, on the one hand, the constant assertion of the right in question, and, on the other hand, consent in that assertion on the part of the affected States. As in prescriptive rights, so in customary rights the two elements are complementary and mutually interdependent.[6]

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[1] Quoted in McNair, *The Law of Treaties* (1938), p. 50.

[2] Printed in the Venezuelan *Argument*, Cmd. 9501 (1899), p. 63.

[3] Ibid.

[4] *I.C.J. Reports*, 1951, p. 171.

[5] Judge Lauterpacht in this *Year Book*, 27 (1950), p. 393.

[6] See Sørensen, *Les Sources du droit international* (1946), p. 101: 'Ce qui caractérise cependant cette catégorie de règles [sur la répartition des compétences entre les membres de la communauté internationale] c'est que l'acte positif d'un État et l'abstention ou la tolérance de l'autre se complètent, de sorte qu'il est sans importance pour l'établissement de la coutume de les considérer séparément.'

The significance of the doctrine of acquiescence in relation to customary international law has been expressed in various ways. According to Professor Hudson the elements necessary to establish the existence of a customary rule are 'the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time'.[1] From this and similar formulations of the requirements of an international custom it is not clear what function the absence of objection by other States is intended to fulfil. Failure to protest against the *conviction that the practice is enjoined by law* (the so-called *opinio juris sive necessitatis*) is not equivalent to acquiescence in the practice itself. It would seem necessary to distinguish clearly between a customary right and a customary obligation. The *opinio juris* may be essential to the development of the binding force of a customary obligation: it plays no direct part in the acquisition of customary rights.[2]

If the process of development of a customary rule is considered from the standpoint of the assertion of a claim, rather than from the standpoint of the imposition of a duty, the relevance of acquiescence becomes clear. Professor (now Judge) Lauterpacht put the matter in perspective thus: 'Unilateral declarations by traditionally law-abiding states, within a province which is particularly their own, when partaking of a pronounced degree of uniformity and frequency and when not followed by protests of other states, may properly be regarded as providing such proof of conformity with law as is both creative of custom and constituting evidence of it.'[3] In his Dissenting Opinion in the *Fisheries* case, Judge Read posed the question whether there had been acquiescence by the United Kingdom in the Norwegian system of delimitation 'so as to enable the claims constituting that system to ripen into rules of customary international law'.[4] It is suggested that the extent to which a uniform practice has been 'accepted as law'—in the words of Article 38 (1) (*b*) of the Statute of the International Court of Justice—may readily be gauged by reference to the degree of acquiescence which the practice has encountered. The doctrine of acquiescence is as significant a factor in the development of a customary right as is the *opinio juris* in the formation of a customary obligation.[5]

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[1] *The Permanent Court of International Justice, 1920–1942* (1943), p. 609. See also Kunz in *American Journal of International Law*, 47 (1953), p. 667.

[2] The *opinio juris* might be considered relevant to the acquisition of customary rights, but only indirectly and only from the standpoint of the conduct of States which may be bound to adopt some positive course of action under the correlative obligation, to permit of the exercise of the right in question.

[3] In this *Year Book*, 27 (1950), p. 395.

[4] *I.C.J. Reports*, 1951, p. 202.

[5] The following explanation is offered, with some diffidence, of the place of the *opinio juris* in the formation of a customary obligation: In the early stages of the development of a claim other interested States are faced with the choice of objecting or remaining passive. From their inaction the inference of consent in and acceptance of the validity of the claim may be drawn and

II. *Prescription and historic rights*

(*a*) *Opinions of writers*

Writers who have devoted particular attention to the juridical foundations of rights acquired by prescriptive or historic processes have consistently assigned to acquiescence, in the form of failure to protest when such a course was both possible and appropriate, a function which is important and influential. To them belongs in great measure the credit for exposing the fundamental antimony which tribunals may be called upon to resolve in questions of disputed title, namely, the rival claims to consideration of the maxim *quieta non movere*,[1] on the one hand, and of the concept of good faith, on the other hand. Hyde explains that the 'strength of the equities' of the principle of prescription 'lies in the implied acquiescence in the condition of affairs which its own conduct . . . has produced', and states that 'it has been deemed more desirable to the family of nations that an adverse occupant long in possession should be suffered to remain in unmolested control than that the existing sovereign, although unjustly deprived of possession, should retain its rights of such, at least when it has failed to make constant and appropriate effort to keep them alive, as by ceaseless protests against the acts of the wrongdoer.'[2] Fauchille, discussing

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strengthened by the passage of time. So far their conduct amounts to voluntary acquiescence. However, at the same time as the claim is developing, its correlative duty is developing. Once that duty involves for its implementation a course of positive action, as opposed to simple tolerance, then the *opinio juris* becomes an element which is essential to endow that course of action with the binding force of a customary obligation. If the practice continues with uniformity and with the conviction, on the part of the States assuming the obligation, that it is enjoined by law, it will ripen into a definitive customary obligation. Only with difficulty, therefore, can it be supposed that the conviction that the practice is thus binding will be subjected to challenge on the part of other States (although it might be open to one of the States assuming the obligation to protest and, so to speak, contract out), since the other States directly concerned are the beneficiaries of the correlative right. The *opinio juris* is thus distinct from acquiescence, but it is the logical consequence of the previous acquiescence which enabled the right correlative to the obligation to be perfected.

[1] The principle underlying the maxim *quieta non movere* was given expression as long ago as 1909 by the Permanent Court of Arbitration in the *Grisbadarna Arbitration* between Norway and Sweden, and it has since received approval which, although general, has not been unreserved. It is a guiding rather than a decisive principle, and writers have not claimed that it should be applied without qualification in all circumstances. The Permanent Court of Arbitration used these words: 'It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible' (translation of Award in *American Journal of International Law*, 4 (1910), p. 233). Gidel states that the evaluation of the effect of protests on the formation of historic titles is a task of particular difficulty in which general rules should be invoked with care. He concludes that it is for those who have to decide such issues to weigh the special circumstances of each case 'en conservant présente à l'esprit la judicieuse considération' of the maxim *quieta non movere* (*Le Droit international public de la mer* (1934), vol. iii, p. 634). Judge Lauterpacht with similar caution pointed out that in international relations the demands of peace and stability were more urgent than in private relations, and concluded that there is a special reason to depart in some cases from strict evidence in matters of good faith, in favour of considerations based on the principle *quieta non movere* (*Hague Recueil*, 62 (1937) (iv), p. 333).

[2] *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., revised, 1945), vol. i, p. 387.

historic bays, attributes their character as such to a combination of factors involving two main elements; first, the length of the period during which continued claims to sovereignty over the area were made by the coastal State; and second, recognition of the claims by some States and the absence of protest on the part of others.[1] The four arctic seas situated along the north coast of the Soviet Union have been claimed as Russian historic bays by the writer of an article in a Soviet journal. This view is justified by reference to international acquiescence in Russian claims.[2] The title of Canada to Hudson Bay as an historic bay has been said by one writer to depend 'on the evidence of occupation by Canada and on the evidence of acquiescence in that occupation by other states'.[3] Gidel emphasized that the legal validity of exceptional claims could be derived only from the acquiescence of other States, manifested in relation to a prolonged practice.[4] The Norwegian jurist, Raestad, referring to claims to extended territorial waters, stated explicitly that the legal validity of such claims depends not so much upon the time and nature of the claim as upon the time and manner of the consent of nations with regard to the claim. It is the factor of consent, he wrote, which, express or tacit, endows the claim with legal validity.[5] There is, in effect, parity of importance between the two concomitant aspects of all questions concerning the acquisition of rights by prescription or similar methods. Neither factor would of itself be conclusive. The matter has been summed up thus: 'Display of authority by the one party, acquiescence in that display by the other party—those are the *sine qua non* of acquisitive prescription.'[6]

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[1] *Traité de droit international public* (8th ed., 1925), vol. i, part 2, pp. 380–2.

[2] See Kulski in *American Journal of International Law*, 47 (1953), pp. 131 ff. He discusses an article by S. A. Vyshnepolskii in the issue of *Sovetskoe Gosndarstvo i Pravo* of July 1952. According to Vyshnepolskii, Russian rights to the Kara Sea have been internationally recognized, either expressly or impliedly. Tsar Ivan IV refused the request of Queen Elizabeth of England in 1583 to allow English ships to navigate the mouths of the rivers flowing into the Kara Sea. Four Russian decrees enacted between 1616 and 1620 forbade any foreign navigation in the Kara Sea; and other Russian legislation in 1833 and 1869 regulated navigation there. 'Notwithstanding direct knowledge of the Kara Sea on the part of several representatives of the Western and Scandinavian countries, the latter did not deem it possible to interfere with the regulations issued by the Russian authorities concerning that sea. The right of Russia, and, by virtue of succession, that of the U.S.S.R. to establish autonomously any legal regime of navigation in the Kara Sea, a right exercised for centuries, was never subject to any protest on the part of the foreign Powers, and must be considered as "an uninterrupted and indisputable custom".'

[3] Dr. V. K. Johnston in this *Year Book*, 15 (1934), pp. 1 ff. Dr. Johnston concludes: 'On the basis of occupation, and acquiescence by other states in that occupation, Canada also has title to Hudson Bay and Hudson Strait, notwithstanding the general six (or ten-) mile rule of international law—for Canada has occupied and has developed the Bay and the Strait for navigational purposes as part of the Canadian national domain; that occupation has not been disputed and therefore has been acquiesced in by other states' (ibid., p. 20.)

[4] *Le Droit international public de la mer* (1934), vol. iii, p. 651.

[5] *La Mer Territoriale* (1913), p. 167.

[6] D. H. N. Johnson in this *Year Book*, 27 (1950), p. 345.

(*b*) *Judicial decisions*

Tribunals to which disputes involving prescriptive claims have been referred have unequivocally affirmed the importance which they have attached to the acquiescence of one party in conduct by the other which related to the subject-matter of the dispute. Acquiescence has seldom formed the sole reason for the judicial determination of a dispute, but it is clear that it is a factor to which courts have ascribed great weight.

(i) *Municipal courts.* Perhaps the most considerable body of judicial authority for the proposition that acquiescence is essential to the validity of a prescriptive title is to be found in the decisions of the Supreme Court of the United States. In a number of disputes between the quasi-sovereign States of the Union involving prescriptive claims, the Supreme Court has stressed the persuasive force of the element of acquiescence. Thus, in the case of *Indiana* v. *Kentucky*,[1] which arose out of a dispute concerning the proper construction of the instrument of cession made in 1783 by the State of Virginia in favour of the United States, Mr. Justice Field, delivering the unanimous opinion of the Court, said: 'This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognised, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.'[2]

The merits of the principle formulated in *Indiana* v. *Kentucky* have since that time received repeated recognition by the Supreme Court of the United States.[3] The most recent occasion was in 1940 in the case of *Arkansas* v.

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[1] 136 U.S. Reports, pp. 509 ff.

[2] Ibid., p. 510.

[3] See, e.g., *Louisiana* v. *Mississippi* (202 U.S. (1906), 1). Chief Justice Fuller, speaking for the Court, said: 'The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both' (ibid., pp. 53–54). The Court, in *State of Arkansas* v. *State of Mississippi* (250 U.S. (1919), 39), refused to depart from the rule of the *thalweg* 'because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain' (ibid., p. 45). The 'rule, long settled and never doubted by this court . . . that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority' was the juridical foundation of the decision of the Court in *Michigan* v. *Wisconsin* (270 U.S. (1926), 295).

Tennessee.[1] Chief Justice Hughes, delivering the opinion of the Court in that case, categorically affirmed the relevance and importance of acquiescence, referring throughout to the concept which the Court applied as 'the principle of prescription and acquiescence'.

The Judicial Committee of the Privy Council made similar use of the concept of acquiescence in its judgment relating to the status of Conception Bay in the case of *Direct United States Cable Company* v. *Anglo-American Telegraph Company.*[2] By the terms of a convention between Great Britain and the United States, United States fishermen were, except for certain limited and defined purposes, excluded from Conception Bay. 'It is true', the judgment ran, 'that the Convention would only bind the two nations who were parties to it, and consequently that, though a strong assertion of ownership on the part of *Great Britain*, acquiesced in by so powerful a State as the *United States*, the Convention, though weighty, is not decisive.'[3] To give effect to the terms of the Convention, British legislation provided that the stipulated restrictions were to be observed by all persons other than natural-born British subjects; and penalties were laid down for non-observance, particularly for refusal to depart from the area if required to do so by the Governor. The Privy Council described these provisions as the strongest possible assertion of exclusive dominion, and concluded that 'as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh Convention was made, this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of *Great Britain*'.[4]

The German Staatsgerichtshof on 10 October 1925 pronounced a provisional order in the case of *Lübeck* v. *Mecklenburg-Schwerin*,[5] which illustrates clearly the essentially twofold nature of a valid prescriptive claim, namely, the assertion of rights on the one side and acquiescence in that assertion on the other. The Court found that since the end of the sixteenth century Lübeck had exercised rights of jurisdiction in respect of fisheries over Travemund Bay which formed part of the territorial waters of Mecklenburg-Schwerin; that by legislation in 1896 Lübeck had unmistakably asserted the existence of the right in question; and that Mecklenburg-Schwerin, which, as a territorial neighbour, must be presumed to have had knowledge of this legislation,[6] neither protested against it in spite of the fact that it was put into force and applied, nor asserted rights on her own behalf in the disputed area until 1925. In the light of these findings the Court granted the application of Lübeck for a provisional order to the effect that Lübeck should be entrusted with, and Mecklenburg-Schwerin restrained from, the regulation of the fishery rights in the disputed area. The decision was based on the long, undisturbed exercise of the rights by Lübeck, coupled with the absence of any protest by Mecklenburg-Schwerin against the Lübeck Law of 1896.

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[1] 310 U.S. 563; *American Journal of International Law*, 35 (1941), pp. 154 ff.; *Annual Digest*, 1938–40, Case No. 44.

[2] (1877) 2 A.C. 394.

[3] Ibid., p. 421.

[4] Ibid., p. 421. The right of the United States to treat Chesapeake Bay as national waters was upheld by the Court of Commissioners of Alabama Claims in *Stetson* v. *United States*. The Court was substantially confirmed in its view by the fact that there had been acquiescence in the claim of the United States on the part of other States (Scott, *Cases on International Law*, pp. 232, 237).

[5] *Annual Digest*, 1925–6, Case No. 85.

[6] See below, pp. 176 ff., on the requirement of notification.

(ii) *International tribunals.* The relevance and importance of acquiescence in the form of failure to protest in appropriate circumstances has been illustrated in a number of international adjudications on disputed title to territory. The United States members of the Tribunal which determined the *Alaskan Boundary* dispute reached their interpretation of the disputed treaty provisions largely by reference to the significance of the actions of the parties subsequent to the conclusion of the treaty. Among the factors which favoured the adoption of the construction for which the United States contended, was the consideration that, for more than sixty years after the conclusion of the treaty, 'Russia, and in succession to her the United States, occupied, possessed, and governed the territory . . . without any protest or objection, while Great Britain never exercised the rights or performed the duties of sovereignty there, or attempted to do so, or suggested that she considered herself entitled to do so'.[1] The opinion of the United States members of the Tribunal cited statements made by the Prime Minister of Canada in the Canadian Parliament admitting that no protest had been made by any government against the occupation of the disputed territory by the United States, and concluded:

> 'It is manifest that the attempt to dispute that possession . . . is met by the practical, effective construction of the Treaty presented by the long-continued acquiescence of Great Britain in the construction which gave the territory to Russia and the United States, and to which the Prime Minister testifies. Only the clearest case of mistake could warrant a change of construction after so long a period of acquiescence in the former construction, and no such case has been made out before this Tribunal.'[2]

The Award[3] rendered by the King of Italy on 6 June 1904 in the dispute between Great Britain and Brazil concerning the boundary between Brazil and British Guiana, while inconclusive as to which party had the stronger claim, leaves no doubt of the importance assumed by the doctrine of acquiescence in the reasoning adopted by the Arbitrator. After concluding that Brazil could be held to have possessed only part of the disputed territory, the Arbitrator held that the Arbitral Award of 3 October 1899 in the boundary dispute between Great Britain and Venezuela, by which the territory constituting the subject of the later dispute was adjudged to Great Britain, could not be cited against Brazil, the latter being 'unaffected by that Judgment'. However, with regard to the conduct of the parties after that date, the Arbitrator found 'That . . . acts of authority and jurisdiction over traders and native tribes were afterwards continued in the name of British sovereignty. . . . That such effective assertion of rights of sovereign jurisdiction was gradually developed and not contradicted, and, by degrees, became accepted. . . . That in virtue of this successive development of jurisdiction and authority the acquisition of authority . . . was effected over a certain part of the territory in dispute.'[1]

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[1] See *Alaskan Boundary Tribunal: Award* of 20 October 1903; printed in Cmd. 1877 (1904), pp. 49 ff., at p. 79.

[2] Ibid., p. 87.

[3] Cmd. 2166 (1904).

In the *Delagoa Bay Arbitration* between Great Britain and Portugal, the French President in his Award of 24 July 1875[2] found in favour of Portugal not only by reason of the Portuguese discovery of the area but, *inter alia*, because Portugal made continual claims to sovereignty over the Bay and the exclusive right to trade there, and upheld those claims by force of arms against both the Dutch and the Austrians. The complete absence of objection to those acts on the part of the Netherlands and Austria was noted by the Arbitrator as confirming the validity of the legal basis of the Portuguese claims.

The Award made on 23 January 1933 in the *Guatemala–Honduras Boundary Arbitration*[3] is of particular interest, as illustrating an occasion on which a protest might usefully have been made, and exemplifying the result of failure to protest. By Article 5 of the Arbitration Treaty of 16 July 1930 the parties agreed that the only judicial boundary which could be established between their respective territories was the *uti possidetis* line of 1821, when their independence of Spain was declared. Accordingly, they agreed that the Tribunal, in determining this line, should be competent to modify it as it saw fit, should it find that subsequent to 1821 one or both parties had secured interests which should be taken into account in definitively establishing the boundary. The Tribunal held that, in its search for evidence of administrative control at the crucial time, and the necessary support for that control in the will of the Spanish King, it was at liberty to inquire into conduct indicating royal acquiescence in colonial assertions of administrative authority. The Crown, as the Tribunal pointed out, was free at all times to alter its commands or to interpret them by allowing what it did not forbid. 'In this situation', the Tribunal observed, 'the continued and unopposed assertion of administrative authority by either of the colonial entities, under claim of right, which is not shown to be an act of usurpation because of conflict with a clear and definite expression of the royal will, is entitled to weight and is not to be overborne by reference to antecedent provisions or recitals of an equivocal character.'[1] Again, the Tribunal emphasized: 'It is manifest that in determining this question, the action of these States in establishing their independent Governments and in formally describing the extent of the territory to the sovereignty over which they regarded themselves as succeeding, is significant. . . . The constitutions of the new States, and the Governmental acts of each, especially when unopposed, or when initial opposition was not continued, are of special importance.'[2] While admitting that no State can acquire jurisdiction over territory in another State solely by declarations on its own behalf, the Tribunal considered it to be no less true that the assertions of authority, and other acts disclosed by the evidence, on the part of Guatemala 'were public, formal acts and show clearly the understanding of Guatemala that this was her territory'.[3] Such acts, the Tribunal added, 'invited opposition on the part of Honduras if they were believed to be unwarranted'.[4] In summing up the circumstances in which the continued and long unopposed assertion of authority by Guatemala over part of the disputed territory operated to raise a presumption in favour of the claim of Guatemala which could be rebutted only by the clearest proof, the Tribunal clearly equated the fatal defect in the case presented by Honduras with her failure to protest. 'If it had been considered that Honduras was being deprived of territory to which she was entitled and especially that Guatemala was asserting authority over territory which was, or prior to independence had been, under the administrative control of Honduras, it can hardly be doubted that these assertions by Guatemala would have aroused immediate antagonism and would have been followed by protest and opposition on the part of Honduras. The intense feeling existing at the time, and the natural jealousy of the new States with respect to their territorial rights, would have caused a prompt reaction. But it does not appear that such protest was made or that opposing action was taken by Honduras.'[5]

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[1] Cmd. 2166 (1904), p. 4.

[2] Printed in Cmd. 1361 (1875), pp. 247–9.

[3] *Reports of International Arbitral Awards* (United Nations Series), vol. ii, pp. 1309 ff.

In the *Grisbadarna Arbitration*[6] of 1909 between Norway and Sweden the Permanent Court of Arbitration considered the acquiescence of Norway in certain acts of Sweden as a factor which supported the validity of the Swedish claims. The ownership of fishing banks off the coast outside territorial waters was in dispute, and the Tribunal indicated, *inter alia*, the following reason why the Grisbadarna Bank should be allotted to Sweden: 'The circumstance that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these regions were Swedish as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought she was exercising her right but even more that she was performing her duty; whereas Norway, according to her own admission, showed much less solicitude in this region in these various regards.'[1] After adverting to the principle *quieta non movere*, the Tribunal concluded: 'The stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protests; . . . It is shown by the foregoing that Sweden had no doubt as to her rights over the Grisbadarna and that she did not hesitate to incur the expenses incumbent on the owner and possessor of these banks even to the extent of a considerable sum of money.'[2]

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[1] *Reports of International Awards* (United Nations Series), vol. ii, p. 1324.

[2] Ibid., p. 1325. [3] Ibid., p. 1327. [4] Ibid., p. 1327. [5] Ibid., p. 1328.

[6] The Award is translated in the *American Journal of International Law*, 4 (1910), pp. 226 ff.

In the *Island of Palmas Arbitration*[3] of 1928, between the United States and the Netherlands, the Arbitrator found that the Netherlands had a good title to the disputed island which it had 'acquired by continuous and peaceful display of state authority during a long period of time'.[4] Evidence of acquiescence by Spain and other States in the 'open and public' display of State authority over the island sufficed to satisfy the Arbitrator that the requirement that the display must be peaceful[5] had been fulfilled. The Award stated: 'Since the moment when the Spaniards, in withdrawing from the Moluccas in 1666, made express reservations as to the maintenance of their sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talautse (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands' sovereignty for the entire period to which the evidence concerning acts of display relates (1700–1906) must be admitted.'[6]

The International Court of Justice confirmed the vitality and significance of the doctrine of acquiescence, in the form of absence of protest, by its treatment of the problem of acquiescence in relation to historic rights in the

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[1] Loc. cit., p. 233.

[2] Ibid., pp. 234–5.

[3] The Award is printed in *Reports of International Arbitral Awards* (United Nations Series), vol. ii, pp. 831 ff.

[4] Ibid., p. 869.

[5] Compare the Award of the Commissioners in the *Chamizal Arbitration* of 1911, between the United States and Mexico (printed in *American Journal of International Law*, 5 (1911), pp. 785 ff.). The Commissioners, after noting the condition that a 'characteristic of possession serving as a foundation for prescription is that it should be peaceable' (ibid., pp. 806–7), concluded that the United States plea of prescription should be dismissed, since 'the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment' (ibid., p. 807).

[6] Ibid., p. 868.

Fisheries case.[1] The Judgment, after stating that the Court was bound to hold that the Norwegian system of delimitation was consistently and uninterruptedly applied from 1869 until the time when the dispute arose, continued: 'From the standpoint of international law it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States. . . . The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. . . . It would appear that it was only in its Memorandum of July 27th, 1933, that the United Kingdom made a formal and definite protest on this point.'[2] This part of the Judgment ends with the following much-quoted passage, which puts the matter clearly and forcefully:

> 'The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.
>
> 'The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.
>
> 'The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of Governments bears witness to the fact that they did not consider it to be contrary to international law.'[3]

Such language confirms the correctness of the view of the United Kingdom as to the essential criteria by which a valid historic title is to be judged. The Court accepted the United Kingdom contention that Norway could justify her claim to fjords and sunds which have the characteristics of a bay or of a legal strait 'on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognised although it constituted a derogation from the rules in force'.[4] The use of the phrase 'general toleration' where 'general acquiescence' might have been expected is of no apparent significance: the terms are synonymous.[5]

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[1] *Anglo-Norwegian Fisheries* case, Judgment of 18 December 1951: *I.C.J. Reports*, 1951, p. 116.

[2] Ibid., p. 138.

[3] Ibid., p. 139. It may be noted that in an earlier passage the Court, preparatory to approving the method of using straight base-lines in conformity with the principle that the belt of territorial waters must follow the general direction of the coast, took into consideration, albeit in cursory fashion, the fact that 'several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other states' (ibid., p. 129).

[4] Ibid., p. 130.

[5] It has been suggested that the phrase 'general toleration' was probably intended to bear a

The fact that the Court did not base its decision solely on the validity of the claim of Norway to an historic title ought not to detract from the importance of the part which the question of historic title assumed both in the pleadings and in the Judgment in the *Fisheries* case. It is significant that the sole reason given by Judge Hackworth for his concurrence in the operative part of the Judgment was that, in his view, Norway had proved the existence of an historic title to the disputed areas of water.[1] The question is given further attention in the separate Opinion of Judge Hsu Mo and in the two dissenting Opinions. Judge Hsu Mo declared that Norway was justified in using her method of delimitation 'because of her special geographical conditions and her consistent past practice which is acquiesced in by the international community as a whole. But for such physical and historical facts, the method employed by Norway in her Decree of 1935 would have to be considered to be contrary to international law.'[2] No less illuminating is Judge Read's treatment of the question of historic title. One of the lines of development he traced in his review of the history of the law relating to territorial waters, ten-mile bays and historic waters, was the recognition that, regardless of breadth, the coastal States could treat as internal waters 'those bays over which they had exercised sovereignty, without challenge, for a long time'.[3] This he characterized as the doctrine of historic waters. He pointed to the absence of successful challenge to the claims of States to those three types of waters since the *North Atlantic Fisheries Arbitration* in 1910. Significantly he concluded: 'They can, therefore, all be regarded as established by rules of customary international law.'[3] Whether the disputed areas may be regarded as historic waters or the Norwegian system may be regarded as 'special or regional law' applicable to Norway, depends, he argues, on the proof by Norway that her system

somewhat weaker meaning than 'general acquiescence' (see D. H. N. Johnson in *International and Comparative Law Quarterly*, 1 (1952), p. 165, n. 33). The remainder of the Judgment hardly supports the view that such a distinction was intended. Confusion may well arise from the looseness of the terminology employed by jurists in this particular matter. If acquiescence is used to signify only tacit consent and not express approval or recognition, the use of the term 'general toleration' in place of 'general acquiescence' does not alter the sense to any readily appreciable extent. The 'imprecise use of such terms as acquiescence . . . sufferance . . . usage . . . and custom' in the course of the case concerning *Rights of United States Nationals in Morocco*, has been the subject of unfavourable comment (see Bin Cheng in *International and Comparative Law Quarterly*, 2 (1953), pp. 361–2; and see below, p. 173.)

[1] *I.C.J. Reports*, 1951, p. 144.

[2] Ibid., p. 154.

[3] Ibid., p. 188. It is tempting to consider this conclusion, at least in relation to the concept of historic waters, as indicating that, in the opinion of Judge Read, there has been acceptance as a rule of customary international law of the notion that the prolonged exercise of sovereignty, without protest from other States, suffices for the acquisition of an historic title; or, to put it in another way, that the principle of prescription or historic title, based on the elements of display of authority and acquiescence in that display, ranks in the hierarchy of sources in Article 38 of the Statute of the International Court of Justice under 'international custom, as evidence of a general practice accepted as law', rather than under the more controversial 'general principles of law recognised by civilised nations'.

evolved as part of the law of Norway, that it was made known in a way in which other States would have, or ought to have, knowledge of it and, lastly, 'that there has been acquiescence by the international community, including the United Kingdom'.[1] Judge Read's appreciation of the evidence led him to conclude that, for reasons with which it is proposed to deal later, there had been no acquiescence by the United Kingdom in the Norwegian system. Similar reasons impelled Sir Arnold McNair to hold likewise, but his treatment of the question of acquiescence is related to the special ground on which Norway relied upon it to justify the 1935 Decree, and it merits separate consideration.[2]

In none of the other cases discussed did acquiescence assume so significant a place as in the *Fisheries* case. Its role in the formation of historic titles was canvassed at length by both parties; and in the Judgment and in the Individual and Dissenting Opinions its relation to historic title and related concepts has been expounded in a manner which establishes its jurisprudential basis on a footing which is at once firmer, more systematic and more authoritative than hitherto.[3]

(*c*) *The practice of States as evidenced by statements in pleadings and other official pronouncements*

States, in their pleadings before international tribunals and in their diplomatic correspondence, have relied, where appropriate, on absence of protest as evidence that the legal validity of the claims in question has been recognized. In the proceedings of the Commission under Article IV of the Treaty of Ghent with regard to the *Title to Islands in Passamaquoddy Bay*, the Agent for Great Britain ended his argument thus:

> 'The simple uncontroverted fact that all these islands now in question . . . were in the possession of His Majesty, and . . . continued in his possession with the tacit consent and acquiescence, not only of the Government of the United States, but that of the State of Massachusetts, always vigilant and tenacious of all her rights . . . must to any unprejudiced mind most strongly evince the sense of both nations at that time with regard to the right to these islands. . . .'[4]

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[1] *I.C.J. Reports*, 1951, p. 194. And see, to the same effect, other passages in the same Opinion (ibid., pp. 195, 197).

[2] See above, p. 150.

[3] In its Judgment in the *Minquiers and Ecrehos* case the International Court of Justice, after reciting the evidence establishing long-continued exercise by the Jersey authorities of administration over the two groups of islets, drew attention to the absence of French protests directed specifically, in the case of the Ecrehos, against a legislative act which the Court considered to be a clear manifestation of British sovereignty, and, in the case of the Minquiers, against a reference, in a British Note of 12 November 1869 to the French Foreign Minister, to the Minquiers as a dependency of the Channel Islands (see *I.C.J. Reports*, 1953, pp. 66, 71). Both Judge Basdevant and Judge Carneiro, who delivered Individual Opinions, gave due weight to the failure of France to protest against the acts by which the British Government exercised authority over the disputed islets (ibid., pp. 83, 106).

[4] Moore, *International Adjudications* (Modern Series), vol. vi, p. 213.

The Colombian argument presented to the Swiss Federal Council, as Arbitrator in the *Colombian–Venezuelan Frontiers Arbitration*, relied successfully on the failure of Venezuela to protest on the two occasions on which a protest would have been expected had Venezuela believed her rights to be affected, namely, the cession by Colombia to Brazil in 1907 of part of the disputed territories and the occupation by Colombia in 1900 of the Orinoco Basin.[1] The point was briefly made thus: 'L'absence de protestation est, en droit international, une des formes de l'acceptation ou de la reconnaissance de certains faits.'[2]

Attempts by the Spanish authorities to capture alleged smugglers at varying distances from the shore, which Spain justified largely by the *tu quoque* argument presented by the British Hovering Acts, prompted Lord Howden in a dispatch dated 9 February 1853[3] to ask if the British Government intended to contest the extended jurisdiction claimed by Spain. Lord Howden indicated that the Spanish claim had been made consistently since the earliest times; and Hertslet, in a Memorandum concerning Lord Howden's query, commented:

> 'It is not stated that Great Britain has at any time objected to this jurisdiction; and it may be assumed that it was exercised at the time when the war commenced between Spain and Great Britain in 1796.
>
> 'In that case, Great Britain may be considered as bound to conform to it since she is bound by treaty to respect the conditions which existed prior to 1796.'[4]

Denmark contended in her pleadings in the *Eastern Greenland* case that, in virtue of the rules of international law respecting possession of territory, absence of protest was a factor which, in conjunction with public, peaceful, and prolonged display of sovereignty, constituted a good and sufficient title.[5] Norway also contended that acquiescence was a vital element in the establishment of an historic title.[6] The Netherlands pointed to the absence of protest by Spain against the Dutch acts of sovereignty over the island of Palmas.[7] The pleadings in the *Delagoa Bay Arbitration*,[8] the *British–Venezuelan Boundary Arbitration*,[9] the *Alaskan Boundary* dispute,[1] and correspondence in the *Alaska* dispute between Russia and Great Britain,[2] provide further examples of the reliance placed on the notion of acquiescence.

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[1] *Reports of International Arbitral Awards* (United Nations Series), vol. i, pp. 250–1, 280.

[2] Ibid., p. 251.

[3] F.O. 72/839, No. 25; quoted in Smith, *Great Britain and the Law of Nations*, (1932), vol. ii, p. 170.

[4] F.O. 72/839; quoted in Smith, op. cit., p. 171.

[5] *P.C.I.J.*, Series C, No. 62, p. 101; No. 66, p. 2873.

[6] Ibid., No. 63, p. 1305.

[7] See, e.g., Appendix to the *Memorandum of the United States of America*, pp. 135, 141, where Notes from the Netherlands are printed in which this argument is employed.

[8] The Portuguese Government argued that evidence of the recognition of the validity of the Portuguese claims was provided by maps and related documents, by the writings of publicists, 'et aussi du fait de la non-contestation de ces droits par les autres nations' (*Case of Portugal*: printed in Cmd. 1361 (1875), p. 87).

[9] For the purpose of this Arbitration it was agreed by Treaty of 2 February 1897 between the

On frequent occasions throughout the proceedings in the *Fisheries* case the Norwegian Government pointed to the absence of any protest on the part of the United Kingdom against the Decrees of 1869 and 1889;[3] and the fact that the United Kingdom was bound to observe the limits therein laid down was admitted by the United Kingdom as a necessary consequence of its acquiescence.[4] Norway, however, persisted in her contention that the acquiescence of other States was not a prerequisite for the formation of an historic title. Although she was prepared to admit that the attitude of other States was a factor of some importance, in so far as she was in agreement with the United Kingdom firstly, that the opposition of the international community would deprive a practice of the peaceful character it required to form the basis of an historic title, and secondly, that a State which had unequivocally opposed a claim from the time it was first formulated would not be bound to submit to it notwithstanding the consent of other States to be so bound,[5] yet she maintained that a State was barred from disputing that it was obliged to conform to a situation which had become established in the course of time, provided that the consolidation had taken place without provoking any reaction on the part of the affected State. The fact that the silence of the affected State might have been due to ignorance of the facts, and hence might not have amounted to acquiescence, Norway considered to be immaterial.

The espousal by Norway of the view that it is possible and proper to dispense with the requirement of acquiescence may be attributed to her

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two States that 'adverse holding or prescription during a period of fifty years shall make a good title'. It was pointed out in the Venezuelan *Argument*, that, when confronted with positive assertions of territorial rights on the part of Spain, the Governor of Essequibo (in the disputed territory) neither protested to Spain nor suggested to his government that a protest should be made. Venezuela read into these facts a clear recognition of the territorial rights of Spain (see Cmd. 9501 (1899), p. 315).

[1] A clear expression of what Canada understood to be implied in failure to protest appears in a speech of the Minister of the Interior in the Canadian Parliament on 11 February 1898. He pointed out that in view of the long undisputed possession enjoyed by the United States, Canada was precluded from attempting to take possession of the territory. 'It must be taken as undisputed when there has been no protest made against the occupation of that territory by the United States.' And he added that the failure to protest was 'an unfortunate thing for us' but a fact (*Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 910).

[2] A Russian Memorandum presented to the Duke of Wellington argued that absence of protest on the part of Great Britain against Russian claims to extended territory signified British acceptance of the validity of such claims. In the words of the Russian Ambassador: 'La Russe étoit donc pleinement autorisée à profiter d'un consentement, qui, pour être tacite, n'en étoit pas moins solonnel . . .' (F.O. 92/51: printed in Smith, op. cit., p. 5).

[3] See *Fisheries* case, *Pleadings*, vol. i, pp. 265, 544–5, 573; vol. iii, pp. 80, 484–5; vol. iv, pp. 188, 218, 317, 549.

[4] See ibid., vol. iv, p. 454.

[5] See ibid., vol. iv, pp. 308–10.

contention that the function of historic title was limited to mere confirmation of the legality of a situation legally justified on other grounds,[1] and this latter contention in turn may be due to a misunderstanding of the nature of acquiescence. To denote by acquiescence both tacit and express agreement tends to confuse the concept of acquiescence proper with that of recognition. The latter has no relevance to the problem of prescriptive or historic rights, whereas the former entails legal consequences only in so far as it takes effect in the context of the passage of time. The period of time required to render acquiescence conclusive rather than merely presumptive varies with the type of claim asserted. It will depend on the intensity with which the claim is manifested; on the publicity surrounding its promulgation or enforcement; on the nature of the right claimed; on the position and condition of the territory affected; and so on. A prescriptive claim affecting the rights of only one other State is hardly on the same footing as an historic claim which, in theory, derogates from the rights of all other States: and in an historic claim the period is conditioned mainly by the extent to which acquiescence is general and thus promotes the conviction that the situation is in conformity with international order. Norway denied that the formation of historic titles could be primarily dependent upon the acquiescence of other States because, she insisted, a title of that kind would be indistinguishable from one resulting from recognition, except possibly in point of form; and even the formal distinction would be obliterated in the case where recognition was inferred from surrounding circumstances.[2]

The United Kingdom Government was charged with ignoring the substantial difference between the theory of recognition and the theory of historic titles, namely, the predominant part played by history in the latter. In this context the insistence of the United Kingdom on the necessity for acquiescence was misrepresented as an insistence upon the consent of other States, express or by necessary inference from surrounding circumstances, irrespective of the passage of time. However, if due weight is given to the consideration that acquiescence is primarily dependent for its legal effect upon the fact that it is necessarily conjoined with the passage of time, it will be seen that the part played by the historic element was recognized to be of major importance by both parties. The following difference, however, persisted: for Norway an historic title was merely confirmatory of rights which were intrinsically valid on other grounds, whereas for the United Kingdom an historic title provided a separate and definitive source of right whose validity was dependent on the element of consent derived from acquiescence. The United Kingdom view was that 'an historic title has its whole legal basis in the express or implied recognition of the title by other States, that is, in their express or implied acquiescence in the enforcement of the exceptional claim'.[1] The Norwegian thesis, although internally consistent, leaves out of account the fundamental factor of the consent of States and conflicts with both the practice of States and the jurisprudence of municipal and international tribunals.

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[1] See *Pleadings*, vol. i, pp. 562–3, and vol. iv, pp. 307–8.

[2] See ibid., vol. iv, pp. 308–9.

Counsel for the United Kingdom in the *Minquiers and Ecrehos* case alluded to the many occasions on which the French Government had refrained from protesting against clear manifestations of the exercise of sovereignty on the part of the United Kingdom, and he observed that 'these omissions related to acts of sovereignty so definite and significant that the failure to take any notice of them amounted to virtual acquiescence [in the British claims] . . . despite the formal protests which the Government of the Republic did from time to time address to the United Kingdom Government'.[2]

(*d*) *The function of acquiescence in the formation of prescriptive and historic rights*

No single element in the principle of prescription in international law has engendered so much disagreement among writers as the question of the length of time required to perfect a prescriptive title. This besetting difficulty of prescription was recognized by counsel for the United States in the *Alaskan Boundary* dispute. He suggested, however, that writers had resolved the problem by the following expedient: 'They built up alongside of prescription a new doctrine which they called acquiescence, and the great cardinal characteristic of acquiescence is that it does not require any particular length of time to perfect it; it depends in each particular case upon all the circumstances of the case. The primary value of acquiescence is its value as a means of interpretation.'[3] The virtue of acquiescence is that it looks for its determining force to the root of the processes which give rise to new rules of international law, finding its justification in the final resort in the consent of the States members of the international legal order. The most helpful definition of prescription is one which substitutes for the stipulation of a fixed term of years a conception which takes account of the consensual basis of the rules of international law. Such a definition is formulated in Oppenheim,[4] where it is proposed that the time of gestation for a prescriptive title be '*such a period as is necessary to create under the*

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[1] See *Fisheries* case, *Pleadings*, vol. iv, pp. 121 ff.

[2] *Minquiers and Ecrehos* case: *Oral Pleadings*, vol. iii, p. 321. The protests which were made were considered ineffectual because they were directed to questions of fishery rights rather than to the disputed question of sovereignty.

[3] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 619.

[4] *International Law* (7th ed., by Lauterpacht, 1948), p. 527.

influence of historical development the general conviction that the present condition of things is in conformity with international order' (italics in original). It is submitted that the existence of this 'general conviction' may be gauged in an accurate and practical manner by recourse to the doctrine of acquiescence, that is, by inferring the consent of the State or States against which title is maturing from their failure to protest, and by deeming them to have thus accepted the situation as 'in conformity with international order'.

III. *Occupation and dereliction*

The impact of protest and acquiescence on the acquisition of title to territory by occupation and on the loss of title to territory by dereliction is of only passing importance. The main feature of the acquisition of title by occupation is the requirement that territory, to be susceptible of occupation, must be *terra nullius*. In practice, there may be considerable difficulty in determining whether the original acquisition satisfied this requirement, the difficulty tending to increase in proportion to the remoteness in time of the acts on which the title is alleged to be based.

It cannot be admitted that protests, however numerous or peremptory, would invalidate a title acquired by occupation, provided that, in the period immediately preceding the acts of occupation, the territory concerned clearly belonged to no State. Both protest and acquiescence in such a case are irrelevant. The purpose of protests is to reserve the rights of the protesting State. To be effective, from a legal point of view, the protest must be directed against the violation of a right which is vested in the protesting State. Where territory is ownerless, no State has a right in relation to the territory which would be infringed by its occupation by another State: hence there would exist no legal basis for protest.[1] An occupying State need not rely on the acquiescence of other States to support its title if, at the time of occupation, the legal status of the occupied territory as *terra nullius* is clear. However, there may be room for doubt concerning the legal status of territory at the time of an alleged occupation in the distant past, as, for instance, when a State asserts sovereignty on the ground that its own title was acquired prior to the purported occupation. In these circumstances assistance may be provided by the doctrine of acquiescence in determining the true legal position of the territory at the time of the acts which are claimed to constitute the title by occupation. Absence of protest in the face of acts performed openly[1] in the establishment of a title by occupation will tend to confirm the likelihood that the territory was *terra nullius* at the critical date.

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[1] See the authoritative exposition of the international law of occupation by Professor Waldock in his article on *Disputed Sovereignty in the Falkland Islands Dependencies*, in this *Year Book*, 25 (1948), pp. 311 ff. The first condition which a valid occupation must fulfil is that it must be peaceful; a rule which, according to Professor Waldock, 'seems to mean no more than that the first assertion of sovereignty must not be a usurpation of another's subsisting occupation nor contested from the first by competing acts of sovereignty' (ibid., p. 335). He points out that the Permanent Court of International Justice, in the case concerning the *Legal Status of Eastern Greenland*, affirmed that mere protests from Norway did not alter the peaceful character of Denmark's display of State activity (*P.C.I.J.*, Series A/B, No. 53, p. 62). These protests were, of course, ineffective since Norway had no legal right which was infringed.

In the same way proof of an intention to abandon a title once perfected may be provided by the continued acquiescence of a State confronted by competing acts of sovereignty. Rather less in the way of State activity may be required to enable a State to retain a right already acquired than might be appropriate for the initial acquisition of the right. It has been pointed out that cases of abandonment in recent times are extremely rare and that jurists are agreed that an intention to abandon must clearly appear: but the same authority adds that the intention to abandon may be spelled out from the circumstances of the supposed withdrawal of State authority.[2] In view of the condition formulated in the Award in the *Island of Palmas Arbitration*—that effectiveness is, and since the nineteenth century has been, necessary for the maintenance of a title by occupation[3]—failure to protest against competing acts of sovereignty, openly performed, might suffice to indicate that the requisite degree of effectiveness in maintaining the title was not being shown. Where there has been no reaction to adverse assertions of sovereignty which were, or ought to have been, known to the original owner, such failure to protest, in circumstances in which both judicial authority and the practice of States afford ample indication of the necessity for protest to preserve the right in question, ought to bear the necessary implication of an intention to abandon the right.

IV. *Limitations on the doctrine of acquiescence*

(*a*) *Acquiescence is to be restrictively interpreted*

Perhaps the safeguard most necessary to a realistic and acceptable application of the doctrine of acquiescence lies in the demand that it be interpreted strictly. The purpose of insisting on circumspection in inferring the consent of a State from its inaction is to ensure that such acquiescence corresponds accurately with the implied intention of the acquiescing State, and to limit the benefits of acquiescence to claims which have been formulated in such a way that the acquiescing State has or ought to have knowledge of them. The two dissenting Judges in the *Fisheries* case supported their view that the United Kingdom had not acquiesced in the Norwegian system of delimitation by reference to the principle that acquiescence should be imputed to a State only in respect of claims which were, or ought to have been, within the contemplation of the acquiescing State during the prescriptive period. The United Kingdom conceded that by its acquiescence in respect of the Decrees of 1869 and 1889 it was bound to respect the limits therein laid down. Both Judge McNair and Judge Read insisted that the effect of that acquiescence was confined to the localities covered by those Decrees and that there had been no acquiescence in claims extending beyond those territories.[1] The majority of the Court, however, read the evidence as showing that the United Kingdom must have known not only of the Decrees of 1869 and 1889 but also of the *system* of delimitation and all its implications.[2] The Imperial Supreme Prize Court in Berlin, in the case of the *Elida*, differentiated between a mere failure to object and a positive concurrence; and it was careful to point to the danger of allowing consent by implication to be given effect beyond the matters contemplated by the State or States whose toleration is invoked as equivalent to consent. The Court observed: 'Furthermore it must be remembered that even if the exercise by a maritime nation of certain official functions, such as those of the health and customs authorities, is tolerated beyond the three-mile zone, this by no means represents a concession to the effect that in all other respects the waters in question are included within the territorial jurisdiction.'[1] Anzilotti has applied the principle to express recognition:[2] no less imperative considerations demand its application to the doctrine of acquiescence.[3]

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[1] The question of notoriety and notification is discussed below, pp. 173 ff.

[2] Hackworth, *Digest of International Law*, vol. i (1940), p. 442.

[3] See *Reports of International Arbitral Awards* (United Nations Series), vol. ii, pp. 845–6. The Arbitrator said (ibid., p. 845): 'The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of law.' A protest alone may be a manifestation of the ability and will to act as sovereign sufficient to rebut any presumption of abandonment. The Arbitrator in the *Clipperton Island Arbitration* held that no question of abandonment by France arose. He said: 'There is no reason to suppose that France has subsequently lost her right by *derelictio*, since she never had the *animus* of abandoning the island, and the fact that she had not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitely perfected' (*American Journal of International Law*, 26 (1932), p. 394). This passage may properly be read in the light of the fact that on the occasion of the only challenge to her authority before the Mexican assertion of right, France did react by protesting to the United States Government. This is not to imply that complete inaction in similar circumstances might not be held to predicate abandonment.

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[1] Judge McNair dealt with the matter in these words: 'The question thus arises whether the two Decrees of 1869 and 1889, affecting a total length of maritime frontier of about 83 miles, and connecting islands but not headlands of the mainland, ought to have been regarded by foreign States when they became aware of them, or ought but for default on their part to have become aware, as notice that Norway had adopted a peculiar *system* of delimiting her maritime territory, which in course of time would be described as having been from the outset of universal application throughout the whole coastline amounting (without taking the sinuosities of the fjords into account) to about 3,400 kilometres (about 1,830 sea-miles), or whether these decrees could properly be regarded as regulating a purely local, and primarily domestic, situation. I do not see how these two Decrees can be said to have notified to the United Kindgom the existence of a system of straight base-lines applicable to the whole coast' (*I.C.J. Reports*, 1951, p. 177). Judge Read expressed similar views (ibid., pp. 200–1).

[2] Ibid., pp. 138–9. The writer shares the concern of those who have criticized the apparent perversity of the Court's evaluation of the evidence and the inferences drawn therefrom (see, e.g., Sir Gerald Fitzmaurice in this *Year Book*, 30 (1953), pp. 33–39). It is going too far, however, to suggest that 'the Court seems to have sanctioned the proposition . . . that where States know of and acquiesce in the application of a special system to a limited area or in a special field, they may thereby be held to have acquiesced in its general application over the *whole* field' (ibid., p. 40). The Court, in fact, inferred from the evidence that the *system* was, or ought to have been, known to the United Kingdom and hence came within the ambit of the doctrine of acquiescence.

(i) *Silence may be interpreted as consent.* Whether silence is to be interpreted as amounting to acquiescence depends primarily on the circumstances in which the silence is observed. Thus Anzilotti remarked that silence maintained by a State after a situation had been notified or had become generally known could fairly be interpreted as acquiescence and as the abandonment of claims to the contrary, if, by virtue of either special agreements or general practice, the occasion was one on which the State could, or ought to, have protested.[4] It is generally admitted, according to Verykios,[5] that long silence maintained without reason is equivalent to consent. The maxims in which this idea finds expression are well known: *quis tacet consentire videtur; taciturnitas et patientia consensum imitantur;*

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[1] The decision is translated in the *American Journal of International Law*, 10 (1916), pp. 916 ff.

[2] *Cours de droit international* (French translation by Gidel, 1929), p. 348: 'Les effets concrets de la reconnaissance sont étroitement liés aux circonstances dans lesquelles elle se produit et à l'objet qu'elle concerne. A un point de vue général on peut dire que ce qui en dérive c'est qu'on ne peut plus contester la légitimité de ce qui a été reconnu. Il est inutile d'ajouter que cet effet, lui aussi, se produit seulement dans les limites précises où la reconnaissance est intervenue.'

[3] The possibility that acquiescence in a limited class of case may be interpreted as acquiescence in a wider class of similar cases is commonly guarded against. An illustration of the dangers in this situation and of the requisite precautions may be found in the following passage from the instructions, dated 20 February 1877, from the Earl of Derby to the British Minister at Rio de Janeiro, on the subject of Brazilian legislation concerning crimes committed by foreigners out of Brazilian jurisdiction: 'With respect to that part of the law which relates to crimes against the Brazilian State, the case is somewhat different. § The right of a State to punish such crimes committed by foreigners out of its territories is claimed by the French Law of the 27th June, 1866, which is only a slight modification of the Law of the 17th November, 1808, in force up to that date. A similar right has been assumed in laws passed by other States, and Her Majesty's Government have not protested against the principle thus laid down. § The only occasion on which Her Majesty's Government protested was in 1852, when it was proposed to pass a law in France extending the principle to crimes against individuals, and on that occasion the proposal was abandoned. § For these reasons Her Majesty's Government feel that they would not be justified in refusing to allow the Brazilian law to be applied to British subjects under certain circumstances, and you will so inform the Brazilian Minister for Foreign Affairs, but in doing so you will point out to his Excellency that the Brazilian law goes much further than the French law, which applies only to crimes "attentatoire[s] à la sûreté de l'Etat", to the forgery of the Seal of State, and counterfeiting national currency or papers; and that a strictly literal interpretation of the . . . Brazilian Code . . . would render non-Brazilians liable to severe punishment for acts which, however culpable they might be if committed by Brazilians, or by foreigners in Brazil, might be perfectly legitimate on the part of a foreigner out of Brazil. . . . Her Majesty's Government cannot for a moment suppose that the Brazilian law was ever intended to apply, or that the Brazilian Government would ever attempt to apply it, to such cases, but at the same time they feel it their duty formally to reserve their right to protest against the application of that law to a British subject should an occasion arise which, in their opinion, would call for remonstrance and intervention.' (The instructions form an Annex to a Report of the Law Officers (by whom it was approved), dated 16 February 1877.)

[4] See Anzilotti, *Cours de droit international* (French translation by Gidel, 1929), p. 344.

[5] *La Prescription en droit international* (1934), p. 26.

qui ne dit mot consent. The validity of the principle is buttressed, Verykios claims, by the existence of what he styles 'le mouvement instinctif de la protestation'.[1] Anzilotti, however, warns against deducing from the widespread practice of formulating protests a too general application for the principle *quis tacet consentire videtur.* It is easy, he asserts, to imagine circumstances in which the silence maintained by a State can be interpreted as amounting to no more than indifference and forbearance from formulating any expression of will.[2] Such an attitude, it is submitted, would tend to make the appreciation of the effect of acquiescence dangerously subjective.[3] Governments are not prone to understate their claims, as Sir Arnold McNair has remarked.[4] No less pertinent are the tendencies which Hyde attributed to States, of sensitiveness to the commission of acts challenging their alleged rights and of 'alertness on the part of aggrieved States to voice protest under the slightest provocation'.[5] It is difficult to believe that States will remain silent without good reason in the face of acts in derogation of their rights if they have even the vestige of a justification for retention of the rights in question. It is a matter of observable fact that the formulation of notes of protest is a constantly recurring feature of the diplomatic practice of States.[6] What is remarkable is their frequency and the variety of the subject-matters with which they deal. The very plethora of notes of protest, while tending to vitiate facile or optimistic generalizations concerning their legal effect, serves to characterize as noteworthy a failure to utilize this adaptable instrument in situations where its use would normally be expected. The formulation of a protest would appear to be almost an instinctive defence mechanism, and this circumstance has led tribunals to scrutinize with a certain degree of scepticism the reasons advanced by a party to excuse its failure to protest in appropriate circumstances.

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[1] *La Prescription en droit international* (1934), p. 26.

[2] See Anzilotti, *Cours de droit international* (French translation by Gidel, 1929), p. 344.

[3] Vattel suggested that a State claiming title by prescription could not impute acquiescence to a State which 'sets forth valid reasons for [its] silence such as the impossibility of speaking' or 'a well founded fear'. This defence against prescriptive claims 'has often been employed', he added, 'against princes who by their formidable power had for a long time reduced the weak victims of their usurpations to silence' (*The Law of Nations* (English translation by Fenwick, 1916), Book 2, ch. 11, para. 144). In the course of the proceedings in the *Minquiers and Ecrehos* case France raised a plea somewhat reminiscent of this contention when she asserted that although she was aware of the British claim she had refrained from protesting simply because she was unwilling to prejudice the good inter-governmental relations then existing between the two parties. This plea, which is obviously open to abuse, was not taken seriously by the United Kingdom (*Oral Pleadings*, vol. iii, p. 321). The Attorney General pointed out that such a plea might well be available in any case in which a State desired to explain away its apparent acquiescence (ibid., pp. 270–1).

[4] *Fisheries* case, Judgment of 18 December 1951: *I.C.J. Reports*, 1951, p. 162.

[5] See *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., revised, 1945), vol. i, p. 390.

[6] Thus, e.g., Hyde, loc. cit.; Anzilotti, loc. cit.

(*b*) *Situations in which consent is not implied from silence*

Although it is generally conceded that rights can be lost by inaction in the course of time, this is not to assert that failure to protest invariably entails this consequence. There may be circumstances which militate against the inference of acquiescence from failure to protest. Pleas of substance are available, by way of explanation, which, if well-founded, serve to rebut the presumption of consent which might otherwise be raised by a long, unexplained silence. The situations envisaged are those in which the parties have kept the question concerned open—by agreement, by the establishment of a *modus vivendi*, or by the continuance of negotiations; or those in which the inaction and abstention from protest has been that of a party without actual or constructive knowledge of the acts to which the alleged acquiescence relates.

(i) *The plea that the question has been left open by the disputing parties.* In the course of the *Alaskan Boundary* dispute, Great Britain sought to avoid the consequences of her failure to protest against the claims which had been made and acted upon by the United States by qualifying the doctrine of acquiescence on which the United States insisted by the proviso that failure to protest is devoid of disabling consequences when it can be shown to concern a question which the parties have agreed to leave open. Sir Edward Carson described acquiescence as 'implying that the one person has deliberately refrained from asserting a right', and he argued that it was 'impossible to say that anything that was done so long as this question remained open . . . could come within any possible doctrine of acquiescence'.[1] The substance of this limitation on the legal effect of acquiescence was not challenged by the United States.[2]

Somewhat similar restrictions on the doctrine of acquiescence were illustrated in two cases decided by the International Court of Justice. In his Dissenting Opinion in the *Fisheries* case Judge Read considered the question of whether there had been acquiescence by the United Kingdom Government in the Norwegian system of delimitation; and in particular whether the failure of the United Kingdom Government to formulate specific protests on receipt of the 1912 Report could be regarded as acceptance of the Norwegian claims. He did not probe the question of whether the Report was an adequate warning of the existence of the system, but commented on the fact that the 1912 Report was adopted by the Norwegian Foreign Ministry, as embodying the principles of international law in support of the Norwegian position, in the course of negotiations for the establishment of a *modus vivendi*. 'By its very nature', he pointed out, 'a *modus vivendi* implies the reservation and preservation of the legal positions of both Parties to the controversy. . . .' In the instant case his argument was strengthened by the express stipulation on which the negotiations were based, to the effect that the question of principle should be left intact. 'In these circumstances', he concluded, 'I think that the British Government was justified in regarding all aspects of the negotiations, including the 1921 Report and the Note of November 29th, 1913, as covered by the basic reservation. The omission to make a specific reservation or objection at this stage cannot possibly be treated as proof of acquiescence in or acceptance of the Norwegian System.'[1]

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[1] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 715.

[2] The contention of the United States, expressed at an earlier stage of the proceedings, was that 'the uniform acquiescence and occasional concurrence of one party in an interpretation openly proclaimed and acted upon by the other . . . [formed] a complete answer to the claim that the interpretation continues open' (*Correspondence Respecting the Alaskan Boundary*, printed in Cmd. 1877 (1904), pp. 1 ff., at p. 20).

In its Judgment in the case concerning *Rights of United States Nationals in Morocco*, the Court held that the fact that Morocco had acquiesced in the continued exercise of consular jurisdiction by the United States for many years after that exercise could have been based on treaty rights, did not amount to recognition of the right of the United States to do so, because, during the period in question, negotiations were proceeding between the United States and France, concerned, amongst other matters, with the question of the renunciation of capitulatory rights. In other words, the Court acknowledged that absence of protest in relation to a situation which it described as provisional did not affect the respective rights of the parties since the question was kept open by the continuance of the negotiations.[2]

(ii) *Knowledge is a prerequisite of acquiescence*. The proposition that the possession on which title by prescription rests must fulfil the requirement of notoriety is scarcely in doubt. It has been stated explicitly by a number of writers.[3] Fauchille points out[4] that only on the condition of notoriety is it possible for a State against which the possession operates to make its view known. Although, he says, it is at first sight difficult to imagine a clandestine adverse possession remaining for long unknown to the owner, it is, nevertheless, possible in the case of territories which are either distant or of slight importance. On the other hand, he states that knowledge must always be presumed if the possession originated in an act of violence. Johnson stresses the importance of publicity as a condition of prescription. 'Publicity is essential', he writes, 'because acquiescence is essential. For acquisitive prescription depends upon acquiescence, express or implied. Acquiescence is often implied, in the interests of international order, in cases where it does not genuinely exist; but without knowledge there can be no acquiescence at all.'[1]

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[1] *I.C.J. Reports*, 1951, p. 203.

[2] *I.C.J. Reports*, 1952, pp. 200–1. This was not, however, the view taken by the four dissenting Judges, who held (at p. 221) that the absence of reservations by France to conduct about which she had knowledge amounted not merely to 'gracious tolerance' but to acquiescence. It may be noted that the onus of satisfying a tribunal that the question has been left open is not easily discharged without the production of evidence of an unequivocal agreement to that effect. This is not surprising in view of the consideration that the most effective alternative to such an agreement would be constituted by evidence of protests or equivalent action; and it is just this proof of disagreement which, presumably, a State against which the doctrine of acquiescence is invoked is unable to substantiate.

[3] A useful summary of authorities on this point is contained in the *Counter Memorial* filed by the United States in the *Island of Palmas Arbitration*, pp. 90–92. Grotius stipulated that, to be effective, the silence must be that of a party knowing and freely willing. (See *De jure belli ac pacis* (Whewell's translation), vol. i, sec. 3, pp. 281–2.)

[4] *Traité de droit international public* (8th ed., 1925), vol. i, part 2, p. 761.

The requirement of knowledge has been canvassed by States before international tribunals and has been confirmed by judicial and arbitral pronouncements. In the dispute between Great Britain and the United States concerning the *Title to Islands in Passamaquoddy Bay*, the Agent for the United States invoked the argument that a claim or act of one party could form no rule of future action unless it was known and acknowledged by the other.[2] In the *Alaskan Boundary* dispute between the same parties, Great Britain met the United States argument that she had acquiesced in the acts and claims to possession of the disputed territory made by the United States by explaining her failure to protest on the ground that she knew nothing of the acts in question and that her ignorance was excusable in view of the uncivilized and inaccessible nature of the country.[3] Similar reasons for failure to protest over a period of sixty years were adduced by France in the *Minquiers and Ecrehos* case and provoked the comment by Judge Carneiro, in his Individual Opinion, that ignorance of what was happening in the disputed areas indicated that France was not exercising sovereignty there.[4] The United States urged that the failure of Spain to question the rights of the Netherlands to the ownership of the Island of Palmas was adequately explained by the reason 'that the Spanish Government had no reason to suppose that the Netherlands Government claimed sovereignty over the island . . .'.[5]

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[1] This *Year Book*, 27 (1950), p. 347.

[2] Moore, *International Adjudications* (Modern Series), vol. vi, p. 95.

[3] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 531: 'They say all these things were done and we never protested. Well, you cannot protest against a thing you have never heard of . . .': so the argument ran. And later: 'How is Great Britain, on any ground of justice or fairness, to be affected with knowledge of such proceedings and acquiescence in them? If it was decreed that we should acquiesce in them . . . surely at least we should have had some notice of it; and there is not even a shadow of a pretence that we knew it. In all that is alleged against Great Britain here, there is nothing that England is accused of having done as a positive act; it all consists of neglect to protest and of omissions' (ibid., p. 533). The contention advanced by the United States that the Ukase of 1799 called forth no protest or objection from foreign States was met by Great Britain's answer that the Ukase, which was in form a domestic act, 'was never notified to any foreign State with injunction to respect its provisions. In point of fact, Her Majesty's Government have been unable to discover that the Ukase of 1799 was communicated to any foreign Government in any form whatsoever' (*Alaskan Boundary* dispute, *British Counter Case*, Cmd. 6920 (1893–4), p. 16).

[4] *I.C.J. Reports*, 1953, pp. 106–7.

[5] *Island of Palmas Arbitration; Memorandum of the United States of America*, p. 94; and, to the same effect, *Counter Memorandum of the United States of America*, p. 71.

The reasoning adopted by the Arbitrator in the case concerning *Pensions of Officials of the Saar Territory* (1934) is possibly an extreme illustration of the proposition that acquiescence without knowledge is of no effect. The German Government asked the Arbitrator to hold that, in accordance with the provisions of the Baden-Baden Agreement concerning officials, dated 21 December 1925, the Governing Commission of the Saar Territory was bound, *inter alia*, to refrain from reducing the Pensions Reserve Fund, created by the Agreement, by withdrawals of capital or income. The Principal Reports on the Pension Fund were made available to the League of Nations, of which Germany was a Member and represented on its Committee at the time when the deficits occurred. 'If, in spite of this', the Arbitrator stated, 'the German Government did not protest against the withdrawals, its silence gave consent.'[1] However, the Award concluded thus: 'The right of Germany to protest against the removal of sums from the Pensions Fund is not forfeited because neither that Government nor the Committee of the Fund have so far protested. The accounts were in fact submitted to the League of Nations and showed withdrawals from the Fund at a time when the German Reich was still a Member of the League and was represented by German nationals in the League's administration. But, at that time, these officials had knowledge of the withdrawals, if at all, only as officials of the League and not as plenipotentiary representatives of the German Government. The right of that Government to protest was acquired only at the moment when it knew of the facts. The Committee of the Fund . . . is an organ of the Governing Commission and it is not necessarily its business to act for the German Government. Accordingly, the claim of the German Government is upheld.'[2]

In its Judgment in the *Fisheries* case, the International Court of Justice held that the enforcement by Norway of her system of delimitation was justified as against the United Kingdom for reasons which established circumstantially the latter's knowledge of the system. The Court said: 'The notoriety of the facts . . . Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.'[3] The dissenting Judges, on the other hand, were clearly of opinion that the facts and circumstances alleged were not such that knowledge of the existence and extent of the system could or ought to be imputed to the United Kingdom, and such knowledge they held to be essential to the binding force of an historic title. Judge Read insisted that whether the disputed areas were to be regarded as historic waters, or the system were to be considered as 'the doctrine of international law applicable to Norway either as special or as regional law', the burden was on Norway to prove three facts: (1) that the system 'came into being as a part of the law of Norway'; (2) that it was made known to the world in such a manner that other nations, including the United Kingdom, knew about it or must be assumed to have had knowledge'; and (3) that there had been acquiescence by the international community, including the United Kingdom.[1] Both Judge McNair and Judge Read came to the conclusion that neither actual nor constructive notice to the United Kingdom had been proved.[2]

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[1] *Reports of International Arbitral Awards* (United Nations Series), vol. 3, p. 1563.

[2] Ibid., p. 1567. On the question of the 'right' of a State to protest compare the view of Judge Alvarez in his Individual Opinion in the *Fisheries* case: 'A State is not obliged to protest against a violation of international law, unless it is aware or ought to be aware of this violation . . .' (*I.C.J. Reports*, 1951, p. 152).

[3] *I.C.J. Reports*, 1951, p. 139.

(iii) *Formal notification of claims is not required.* In a Note dated 7 April 1951 the French Government, in response to a request of the United Kingdom Government, stated its views with regard to the claims of various Central and South American States to extend their respective territorial waters beyond the generally recognized limits. The Note read, in part, as follows: 'Le Gouvernement français n'a jamais reçu, par la voie diplomatique, notification des resolutions ou propositions adoptées, de 1945 à 1950, par le Mexique, le Chili, le Pérou, Costa-Rica et le Salvador, ayant pour effet de changer la limite de leurs eaux territoriales. Il n'a donc pas eu, dans ces cas précis, à formuler un avis.'[3] With this statement may be compared the view expressed in a Note by the United States Secretary of State, Seward, concerning the Spanish claim to a six-mile maritime belt off Cuba: 'A claim thus asserted and urged must necessarily be now respected and conceded by the United States, if it could be shown that on its being brought to their notice they had acquiesced in it, or that on its being brought to the notice of other Powers it had been so widely conceded by them as to imply a general recognition of it by the maritime Powers of the world. It is just here, however, that the claim of Spain seems to need support. Nations do not equally study each other's statute books, and are not chargeable with notice of national pretensions resting upon foreign legislation.'[4]

Apart from the above official statements, there is little authority for the view that actual or formal notification is necessary. Neither the Award in the *Island of Palmas Arbitration* nor that in the *Clipperton Island* case lends any support to the argument that official notification of a claim is a precondition of its validity. The Arbitrator in the *Island of Palmas Arbitration* made the following remarks on the conditions for the acquisition of sovereignty 'by way of continuous and peaceful display of State authority (so-called prescription)':

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[1] *I.C.J. Reports*, 1951, pp. 194–9.

[2] Ibid., pp. 180, 201, 204.

[3] Printed in *Fisheries* case, *Pleadings*, vol. iv, p. 605. The following tentative opinion was proffered by counsel for Great Britain in the *Alaskan Boundary* dispute as to the necessary notice as between nations in regard to claims of which acquiescence was a relevant ingredient: 'I should suppose it is notice by the one Executive Government, or the proper officer of one Executive Government, to the proper officer of another Executive Government' (*Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 537). The Award by implication rejected the view that such notice was necessary.

[4] Printed in Moore, *Digest*, vol. i, p. 710.

> 'The display has been open and public. . . . A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or the display of sovereignty in these territories did not exist.
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> 'Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply *de plano* to other regions. . . .'[1]

The test which the Arbitrator applied, indirectly, in his review of the conditions which peaceful display of sovereignty must fulfil to ground a prescriptive title, fell far short of a requirement of notification. He propounded, in relation to the acquisition of sovereignty, a test which might, *mutatis mutandis*, satisfactorily be adopted in relation to the acquisition of other rights by prescriptive or historic processes. He demanded that the display of sovereignty exist continuously and peacefully for 'long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a reasonable claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights'.[2] By this standard, a measure of vigilance on the part of States in defence of their rights is deemed appropriate.

The Arbitrator in the *Clipperton Island* case[3] in 1931, between France and Mexico, was similarly ready to dispense with the requirement of official notification. Within a month of the original visit of the French naval detachment, the French Consul at Honolulu had published the declaration of French sovereignty over the island in the English journal *The Polynesian.* The relevant passage of the Award states: 'The regularity of the French occupation has also been questioned because the other Powers were not notified of it. But it must be observed that the precise obligation to make such notification is contained in Art. 34 of the Act of Berlin . . . which . . . is not applicable to the present case. There is good reason to think that the notoriety given to the act, by whatever means, sufficed at the time, and that France provoked that notoriety by publishing the said act in the manner above indicated.'[4]

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[1] *Reports of International Arbitral Awards* (United Nations Series), vol. ii, p. 868.

[2] Ibid., p. 867.

[3] The Award is printed in the *American Journal of International Law*, 26 (1932), pp. 390 ff.

[4] Ibid., p. 394. The Arbitrator stated that there was 'ground to hold as incontestable, the

There has been no disposition on the part of writers, at least since the time of the *Clipperton Island* case, to stipulate that occupations be formally notified. Professor Ross, for example, writes that 'a formal declaration of occupation or notification is not required, but of course is often to be recommended by way of proof'.[1] It has been suggested that the requirement of publicity (not notification) for the acquisition of title by *possessio longi temporis* is so often realized that it can readily be presumed,[2] and even that it might be dispensed with altogether.[3] Fauchille, however, writing in 1925, insisted that formal notification was essential to the validity of a title by occupation.[4]

(iv) *Notoriety and constructive notice; the force of the plea of excusable ignorance.* Acceptance of the test of notoriety in place of notification, as indicated in the preceding section, necessarily leads to the adoption of the concept of constructive notice. There is little doubt that the Court in the *Fisheries* case imputed to the United Kingdom knowledge of the Norwegian system of delimitation which could have been nothing more than constructive;[5] and it was on the basis of notoriety and constructive notice that the dissenting Judges discussed the problem of acquiescence.[6]

It may perhaps be concluded from the Judgment in the *Fisheries* case

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regularity of the act by which France in 1858 made known in a clear and precise manner, her intention to consider the island as her territory' (ibid., p. 393).

[1] *A Textbook of International Law* (1947), p. 147.

[2] Charles de Visscher, *Théories et réalités en droit international public* (1953), p. 243: 'Bien qu'il ne soit guère possible d'énoncer des critères précis au sujet de la portée juridique de l'abstention ou du silence qui, dans certains cas, peuvent s'expliquer par une absence passagère d'intérêts, il est permis de constater que la multiplicité croissante des relations entre Etats, l'intensité de leurs activités concurrentes, la publicité qui les entoure, tendent, à notre époque, à abréger la durée de la période requise pour une consolidation par l'action du temps.'

[3] Verykios, *La Prescription en droit international public* (1934), p. 75.

[4] *Traité de droit international public* (8th ed., 1925), vol. i, part 2, pp. 738 ff. Discussing the form of notification, Fauchille wrote: 'C'est par la voie diplomatique ordinaire qu'il doit y être procédé, que la notification doive être remise individuellement à chaque puissance ou d'une manière collective par une communication au secrétariat de la Société des Nations. Une insertion dans l'organe officiel des actes publics d'un État, c'est-à-dire, dans son Journal officiel, ne serait pas suffisante: un article de quelques lignes publié dans un journal peut échapper à l'attention. La notoriété d'une prise de possession ne saurait dispenser de sa notification: l'admettre serait ouvrir la porte aux abus et rendre possibles bien des conflits' (ibid., p. 739). The terms of Article 34 of the Act of Berlin, he added, 'condamnent l'idée que la notoriété pourrait équivaloir à une notification' (ibid., p. 743).

[5] The following passage illustrates the position adopted by the Court: 'The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety, essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies *a fortiori* to the Decree of 1889 . . . which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice' (*I.C.J. Reports*, 1951, pp. 138–9).

[6] Ibid., pp. 171–2, 194, 199, 201.

that the views of Secretary Seward in his Note of 1863, to the effect that 'Nations do not equally study each other's Statute-books, and are not chargeable with notice of national pretensions resting upon foreign legislation'[1]—which were canvassed by the United Kingdom—no longer carry decisive weight. It is, moreover, doubtful whether such a view of the practice of States was valid at the time of its enunciation. Counsel for the United States in the *Alaskan Boundary* dispute stated what was probably the more accurate view when he discounted the British claim to have been totally unaware of the acts and claims of the United States performed in conformity with her interpretation of her treaty rights. 'These acts', counsel said, 'were not done in the dark, but publicity was given to them. All Governments of this day—that is, first class Powers—are generally informed in regard to published public documents. . . . The Treaty of Purchase was the subject of lengthy debate in Congress in 1868, and it is a violent presumption to say that the British Minister at Washington had no knowledge of it. On the contrary we may safely assume that he had full knowledge, for being there, an alert and able Representative of his Government, you may be sure that nothing appeared in the official publications that did not pass under the eyes of his secretaries.'[2]

In the light of the above considerations, and in view of the readiness with which the Court in the *Fisheries* case imputed to the United Kingdom knowledge of Norwegian legislative claims, further inquiry into the attitude of the Court towards the degree of notoriety attributable to domestic legislation may assist in gauging the likelihood of success of a plea of ignorance by one State of the legislation of another. In the case of the *Anglo-Iranian Oil Company* (Preliminary Objection), the Court found confirmation of the intention of Iran, with regard to her Declaration of acceptance of the 'optional clause' of Article 36 of the Statute of the Court, in an Iranian Law of 14 June 1931 by which the Majlis approved the Declaration, and which was passed between the times of signature and ratification of the Declaration. The Court was careful to remark that the Law could not afford a basis for the jurisdiction of the Court and that it was 'filed for the sole purpose of throwing light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the Declaration'.[3] Although Judge McNair[4] and, more emphatically, Judge Hackworth[5] dissented, the following passage of the Judgment is significant:

'It is contended that this evidence as to the intention of the Government of Iran should be rejected as inadmissible, and that this Iranian law is a purely domestic instrument, unknown to other governments. The law is described as "a private document written only in the Persian language which was not communicated to the League or to any of the other States which had made the declarations."

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[1] Printed in Moore, *Digest*, vol. i, p. 710: see above, p. 176.

[2] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 916. See also ibid., pp. 921–2.

[3] *I.C.J. Reports*, 1952, p. 107.

[4] In his Individual Opinion, Judge McNair stated that he had not relied on the Iranian Law in question and that he would have preferred to exclude its consideration from the Court. Its admissibility, he said, was open to question, and its evidentiary value slight (ibid., p. 121).

[5] Judge Hackworth considered that it was neither necessary nor permissible to rely on the

'The Court is unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian laws voted and ratified during the period from January 15th, 1931, to January 15th, 1933. It has thus been available for the examination of other governments during a period of about twenty years.'[1]

From this it may be predicated that legislation published in the normal manner ought to be known. *A fortiori*, it may be contended, legislation on matters which may be of more apparent international interest ought to be known and scrutinized with particular care.[2] It may be considered that States have done all that can reasonably be expected of them, in the way of spelling out the intentions of a claimant State, by looking to its declaration publicly made in the international sphere, without there being any obligation on them to evaluate the international act in the light of possible explanations in the form of municipal legislation. However, in the case of legislation by a State in which it makes a claim of an international character, the legislation is itself the international act by which the State has declared its intention; and it may for this reason be more readily argued that it should be taken at its face value and that it should be known.

Despite the reluctance of tribunals to attach more than slight weight to the evidence afforded by maps with regard to territorial claims,[3] governments do not let such claims pass unopposed, and protests against map claims are not unknown.[4] Failure to protest against such a claim has been

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Iranian law in question to furnish evidence of the Iranian intention since, he said, 'that was a unilateral act of a legislative body of which other nations had not been apprised' (ibid., p. 136). The fact that it was 'a public law which was available after 1933 to people who might have had the foresight and the facilities to examine it' (ibid., p. 137) was no answer, he said, to his contention that the Court must look to the public declarations made by States for international purposes, and cannot resort to municipal legislative enactments to explain ambiguities in international acts. He added that to have put other States on notice of the discrepancy between the Declaration and the act of approval, the law should have been attached to the instrument of ratification filed by Iran with the League of Nations (ibid., pp. 136–7).

[1] *I.C.J. Reports*, 1952, p. 107.

[2] The views of Judge Hackworth are strengthened by the circumstances which he envisaged, that is, when the legislation purports to explain an international act deposited with an international organization for publication.

[3] See, e.g., the views of the Arbitrator in the *Island of Palmas Arbitration: Reports of International Arbitral Awards* (United Nations Series), vol. ii, pp. 852, 853–4. And see the Individual Opinion of Judge Carneiro in the *Minquiers and Ecrehos* case: *I.C.J. Reports*, 1953, p. 105.

[4] Lord Salisbury, in a letter dated 2 August 1887 to the British representative at Lisbon, stated that it was 'impossible . . . to pass over without notice the official publication of the maps' which appeared to make claims on behalf of Portugal which conflicted with British interests. The maps were published as part of Portuguese White Books in which were recorded the results of negotiations by Portugal with Germany and France. (Cited in Smith, *Great Britain and the Law of Nations* (1932), vol. ii, p. 8.) And see the protest by Honduras against the attribution of Swan Island to the United States in an official United States map (*Foreign Relations of the United States* (1935), vol. 4, pp. 750–2).

relied on as a recognition of its validity.[1] The practice of States in this matter affords further evidence of the need for a substantial measure of self-interested awareness on the part of Foreign Offices and the services they administer.

It has been seen that silence and inaction in any sphere of international activity in which States may have particular or general rights to protect may, under certain conditions, entail the loss of those rights. The plea of excusable ignorance of the official acts of a State, legislative or otherwise, has seldom been successful. The onus of satisfying a tribunal in this matter is a heavy one, commensurate with the sense of responsibility and vigilance traditionally displayed by States in defence of their rights. It would, indeed, furnish cause for misgivings if, as has been alleged, 'under the Court's formulation, it would seem that ignorance as to another state's legislation on territorial waters, however excusable, can be fatal, and that states may neglect, at their own risk, to study each other's statute-books'.[2] However, as has been suggested,[3] the concepts of notoriety and constructive notice invoked by the Court, in view of the position of the United Kingdom as a North Sea Power particularly concerned in questions of maritime law, were instrumental in impressing the majority of the Court that the ignorance of the United Kingdom, if ignorance there had been, was, in the circumstances, inexcusable. It must be presumed that one of the purposes of the establishment and maintenance of diplomatic and consular posts in foreign States is to ensure that the sending State is apprised of the public acts and, indeed, of any official act of the receiving State in any matter affecting the interests of the sending State.[4] The hypersensitiveness of States, and their alertness to protest[5] against every actual or potential threat to their rights,[6] serves only to accentuate the significance of failure to protest in appropriate circumstances.

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[1] See the text of the Russian Memorandum delivered by Count Lieven to the Duke of Wellington in the course of the *Alaska* dispute between Great Britain and Russia (F.O. 92/51: cited in Smith, op. cit., p. 5). Compare the views of counsel for Great Britain in the *Alaskan Boundary* dispute, who denied that 'it is the part of one nation to maintain a constant supervision over all the maps of all the civilized nations in the world, and by the lapse of time to be bound by what they say' (*Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 528).

[2] D. H. N. Johnson, in *International and Comparative Law Quarterly*, 1 (1952), pp. 165–6.

[3] See above, p. 178.

[4] Counsel for the United Kingdom in the *Minquiers and Ecrehos* case contended that the vigilant attitude of the United Kingdom concerning her rights over the disputed islets was consonant with a claim to sovereignty. It contrasted favourably, he said, 'with the lack of notice on the part of the French authorities of so many significant British acts. . . . Yet France has for many years maintained a career consul in Jersey. It is difficult to believe that France can maintain a consul in Jersey, and yet not be well aware of the Jersey attitude and position regarding the Minquiers and the Écréhous and well aware of most of the salient facts' (*Minquiers and Ecrehos* case: *Oral Pleadings*, vol. i, p. 159).

[5] See Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed. revised, 1945), vol. i, p. 390.

[6] Seven years after the Award in the *Island of Palmas Arbitration* the island again formed the subject of diplomatic correspondence between the Netherlands and the United States. The Netherlands Minister in Washington, in a Note dated 10 July 1935, brought to the attention of the Secretary of State the apparent inclusion, in Article I (i) of the Constitution of the Common-

V. *Conclusions*

The main points in the foregoing discussion may now be recapitulated briefly and, in the light of the conclusions, some observations may be made concerning the jurisprudential significance of the doctrine of acquiescence.

(1) Acquiescence is equivalent to tacit or implied consent. It takes the form of silence or absence of protest in circumstances which, according to the practice of States and the weight of authority, demand a positive reaction in order to preserve a right.

(2) It may be said to constitute an admission or recognition of the legality of the practice in question, or to serve the purpose of validating a practice which was originally illegal.

(3) A consequence of acquiescence is to preclude an acquiescent State from denying or challenging the validity of a claim in which it has acquiesced.

(4) Acquiescence is of special relevance to situations involving the application of rules of which the content or authority is open to doubt either because the rules are controversial or because they are still in process of development.

(5) The value of acquiescence is primarily evidential. However, it may afford a criterion by which the measure of acceptance of a claim may be gauged, and it may provide sufficient justification for preferring one interpretation of the rights and obligations under an instrument rather than another, on the principle that that interpretation is to be adopted which has been acted upon by one party without meeting with objection from the other.

(6) Acquiescence may furnish an indication of an intention to abandon a right previously enjoyed or a claim previously asserted.

(7) In the formation of both customary and prescriptive rights acquiescence is a necessary and significant factor, inasmuch as the validity of both classes of rights depends substantially on the degree to which they are considered to be in conformity with law, a condition which may be established by the extent to which the practice in question has encountered

wealth of the Philippines, of Palmas in limits referred to as those set forth in Article III of the Treaty of Paris of 1898. The Minister adverted to the decision of the Arbitrator in 1928 by which the island was awarded to the Netherlands; he continued: 'As however the Constitution of the Philippines refers to that Article without mentioning that fact or in any other way explicitly excluding the island of Miangas from its provisions, a certain—although remote—possibility of misunderstanding is not entirely excluded with regard to the sovereignty of the island in question.' The Minister requested an assurance that Palmas was not comprised within those limits: this was given by the Acting Secretary of State in a Note dated 17 July 1935 (*Foreign Relations of the United States*, 1935, vol. 2, pp. 605–6).

acquiescence on the part of the affected States, and which may remain unfulfilled in the light of evidence of protest or equivalent measures on the part of those States.

(8) The range of application of the doctrine of acquiescence is thus considerable. To preclude its application to circumstances which do not warrant it, and to ensure its acceptance where appropriate, the doctrine is qualified by certain necessary safeguards. Thus a State is not held to have acquiesced unless it is deemed to have had actual or constructive knowledge of the claim in question, although this need not amount to formal notification; and the effect of acquiescence is in every case confined strictly within the limits of the claim asserted and does not embrace other similar or wider claims. The presumption of consent which may be derived from acquiescence may, of course, be rebutted by a clear indication of a contrary intention.

Of the valuable features of the notion of acquiescence, three may be mentioned which are of considerable practical and theoretical interest. In the first place, it provides a salutary corrective to the more exaggerated theories of State sovereignty and it assists in circumscribing the extravagant pretensions to unlimited freedom of action on the part of States which, while basing this claim on the concept of sovereignty, nevertheless ignore the sovereignty of other members of the international community. The Judgment of the Permanent Court of International Justice in the *Lotus* case[1] appeared to sanction the proposition that States, by virtue of their sovereignty, are free to do anything which is not prohibited by a rule of international law and that the presumption operates against restrictions on the independence of States. The Court deliberately chose to state the issue before it by reference to the view of the Turkish Government that the Turkish courts should be considered competent to exercise jurisdiction 'whenever such jurisdiction does not come into conflict with a principle of international law', rather than by reference to the contention of the French Government that the onus was on Turkey 'to point to some title to jurisdiction recognised by international law in favour of Turkey'.[2] A similar disposition is to be observed in the operative part of the Judgment of the International Court of Justice in the *Fisheries* case.[3] The implications of the view that States are entitled to act in any way which is not expressly or by necessary inference prohibited by a rule of international law are not so inimical to the authority of the rule of law or the maintenance of international order as might appear at first sight.[4] The wide discretion which States enjoy in many fields is an inescapable consequence of the absence of clear and generally accepted rules in those matters. The Court in the *Lotus* case justified its method of stating the issue on the ground not only that it was in conformity with the terms of the *compromis*, but also that it was 'dictated by the very nature and conditions of international law'.[1] The difficulties of a plaintiff State in its search for a prohibitive rule in such circumstances are not merely the result of the unfettered independence of the defendant State but are inherent in the unsettled state of the law which such a situation presupposes.[2] The task of a tribunal in such a case is not confined to testing the legality of the course of action in question solely by reference to the will of the actor State, but must include a consideration of the extent, if any, to which that action has impinged upon the rights of other States. Valuable evidence is afforded by the reaction of the States affected thereby, that is, by their refusal to recognize its legality by protesting against it, or by their admission of its legality, to be inferred from their acquiescence. Thus the emphasis which the Court in the *Lotus* case placed on the wide measure of discretion enjoyed by States in the matter at issue[3] ought not to obscure either the importance which the Court attributed to the fact that States had acquiesced in the assumption of jurisdiction in similar circumstances or the evidential value which it would have attached to protests in those circumstances.[4]

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[1] *P.C.I.J.*, Series A, No. 10.

[2] Ibid., p. 18.

[3] *I.C.J. Reports*, 1951, p. 143.

[4] Compare the views of Sir Gerald Fitzmaurice in this *Year Book*, 30 (1953), pp. 8–18.

In the second place, the doctrine of acquiescence serves to temper the apparent rigidity of certain of the canons of positivism. Were the beneficent influence of the doctrine of acquiescence to be disregarded, insistence that a rule is not binding on a State without its consent might well prove a substantial obstacle in the way of the development of international law. Again, a passage from the Judgment of the Permanent Court of International Justice in the *Lotus* case has been interpreted as an indication that the Court was firmly wedded to positivist principles. The Court stated: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.'[1] The rigorous effects of applying strict positivist tests to the validity of a rule are mitigated somewhat, as one authority has suggested,[2] by the acknowledgment that the free will of States which evidences their consent to be bound may be expressed not only in conventions but also by reference to their acquiescence in usages which become thereby 'generally accepted as expressing principles of law'.

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[1] *P.C.I.J.*, Series A, No. 10, p. 18.

[2] The Court in the *Lotus* case considered that the contention of the French Government that Turkey must be able to cite a rule of international law authorizing her to exercise jurisdiction was 'opposed to the generally accepted international law' and would 'in practice . . . in many cases result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of . . . jurisdiction' (ibid., pp. 19–20).

[3] Ibid., p. 19: 'Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.' The Court also said: 'In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty' (ibid.).

[4] Ibid., p. 29: 'On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests. . . . It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia–Oncle-Joseph* case and the German Government in the *Ekbatana–West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.' See also the discussion of this matter by Judge Lauterpacht in *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 103–4.

Finally, it must be emphasized that a far-reaching consequence of the doctrine of acquiescence is to stress the perils which confront States which are content to rely for the protection of their rights and interests upon the simple existence of generally accepted rules of international law. It has already been suggested that the body of rules which have met with general acceptance and can be clearly understood as obligatory is much smaller than might be supposed. The occasional flouting of an established rule by one or several States will not, *per se*, invalidate the rule, although it may tend to weaken its authority. To this extent the existence of the rule suffices to protect the rights of States relying on it. Repeated violations of the rule, however, or the continued and unopposed assertion of claims which are incompatible with it, although not necessarily invalidating the rule, have the effect of diminishing its sphere of application. The acquiescence of States affected by such a claim may be interpreted as a recognition of its legality as far as they are concerned, with the result that a customary or prescriptive right to be exempted from the operation of the rule may be acquired by the participants in the exceptional claim. It is clear that general disregard of a rule and the adoption of a constant general and uniform practice in violation of it not only undermine its authority but effect the substitution of a new generally accepted rule for the old one. This would be so had the old rule been of established authority or merely putative. The conclusion can hardly be avoided that a similar derogation of existing law would be entailed by general acquiescence in a practice initiated by a group of States in violation of established rules, provided that the practice affected the generality of States and met with no opposition. It would seem to be incumbent, therefore, both upon States which have a stake in upholding the sanctity of established principles of law and upon States which are intent on preserving their rights, to maintain a scrupulous standard of vigilance in keeping with their rights and responsibilities, and, in their own interest, to exhibit a readiness to react unequivocally, by protest or similar measures, on the occasion of each and every encroachment on their rights or infraction of the principles of law which they are concerned to defend.

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[1] *P.C.I.J.*, Series A, No. 10, p. 18.

[2] Judge Lauterpacht, op. cit., pp. 102–3.

PASSAGE OF SHIPS THROUGH INTERNATIONAL WATERWAYS IN TIME OF WAR

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To the extent that all forms of international waterways, including inter-oceanic canals, straits, and international rivers share the characteristics of being important highways of commerce and communication for varied types of shipping and of possessing corresponding strategic importance, they may be expected to raise parallel problems of assuring free transit.[2]

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[1] This study was prepared in connexion with a programme of research on the legal status of international waterways conducted at the Law School of Harvard University. The author is indebted to his associate, Dr. Jan Triska, for valuable suggestions.

[2] The controversy, not yet fully resolved, with regard to the passage of ships through the Suez Canal which arose during the period of active hostilities between Israel and Egypt and has continued throughout the years in which relations between the two countries have been regulated by the Armistice of 24 February 1949 has lent new emphasis to the problem of assuring the free navigation of international waterways. For the General Armistice Agreement between Israel and Egypt, signed at Rhodes, 24 February 1949, see *U.N.T.S.*, vol. 42, p. 251. The Egyptian regulations concerning passage of shipping through the Suez Canal are to be found in Proclamation No. 5, 15 May 1948 (J.O. 51); Proclamation No. 13, 18 May 1948 (J.O. 55); Official Notice of the Military Governor, 29 June 1949 (J.O. 89); Decree of 6 February 1950 (J.O. 36), U.N. Doc. S/3179, 15 February 1954; Amendment of Decree of 6 February 1950, as published in *Al Misri*, Cairo, 28 November 1953, U.N. Doc. S/3179, 15 February 1954, p. 6. Concerning the protests of the British Government respecting these measures see answers to questions and debates in the House of Commons in *Official Report*, vol. 461 (1948–9), cols. 107–8; vol. 466 (1948–9), col. 479; vol. 473 (1950), cols. 326–7; vol. 476 (1950), cols. 191–2; vol. 478 (1950), cols. 180, 293, 2022; vol. 484 (1950–1), col. 57; vol. 485 (1950–1), col. 2404; vol. 510 (1952–3), col. 1828; vol. 522 (1953–4), col. 1445; *The Times* newspaper, 31 May 1949, p. 4, col. 7; 16 June 1949, p. 4, col. 3; 7 September 1950, p. 3, col. 5; 11 December 1950, p. 3, col. 4. The texts of the Notes exchanged by the United Kingdom and Egypt have not been published. Concerning protests by other maritime Powers, see *The Times* newspaper, 10 October 1949, p. 4, col. 1; 13 December 1950, p. 5, col. 4; 14 December 1950, p. 5, col. 1; 2 July 1951, p. 5, col. 3; 8 August 1951, p. 4, col. 5. See also the Resolution of the Security Council of the United Nations of 1 September 1951, U.N. Doc. S/2298/Rev. 1, calling upon Egypt to terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal, and for the debates preceding the adoption of the Resolution U.N. Docs. S/PV.549, S/PV.550, S/PV.551, S/PV.552, S/PV.553, S/PV.555, S/PV.556, S/PV.558. For later communications and discussions of the matter in the Security Council, seeU.N. Docs S/PV. 658, S/PV.659, S/PV.661 to S/PV.664; and concerning the *Bat Galim* incident, S/PV.682 to S/PV. 688, S/3300, S/3296, S/3297, S/3298, S/3302. The Egyptian case is presented in 'Conclusions du Gouvernement Egyptien au sujet des plaintes des Gouvernements étrangers quant à la visite des navires neutres et la saisie des objets de contrebande dans les ports égyptiens', in *Revue égyptienne de droit international*, 7 (1951), p. 235, and Safwat Bey, 'The Egyptian Prize Court: Organization and Procedure', ibid. 5 (1949), p. 28; and that for Israel in *The United Nations and the Egyptian Blockade of the Suez Canal; A Study Sponsored by the Lawyers Committee on Blockades* (New York, 1953); see also 'The Security Council and the Suez Canal', in *International and Comparative Law Quarterly*, vol. 1 (1952), p. 85. See *Leolga Compañía de Navigación* v. *John Glynn & Son Ltd.*, [1953] 2 Q.B. 374, regarding the effect of Egyptian blacklisting, and *Affaire Flying Tiger* (arrêt du 2 décembre 1950, Conseil des Prises d'Alexandrie), *Revue égyptienne de droit international*, 7 (1951), p. 127, regarding the visit and search of ships passing through the Suez Canal.

As the whole matter of the regulations adopted by Egypt with regard to the passage of shipping through the Suez Canal during the undeclared war with Israel is, at the time of writing, in the realm of controversy, it is not discussed in this article.

To the long-standing question of how to guarantee the free navigation of waterways used by the shipping of the world for international communication, experience derived from international rivers can probably offer the least guidance. By their nature, their fortunes are more closely linked to those of the land mass through which they pass than are those of canals and straits, and their significance as international highways open to all nations on a basis of equality is proportionately less in time of war. However, straits and inter-oceanic canals, despite the difference presented by their being respectively natural and artificial waterways, pose the problem in a particularly acute form by reason of the fact that they afford for both warships and merchant vessels access between great expanses of the open sea.

The existence of a war to which either the State through whose territory the waterway passes or a user[1] of the waterway is a party creates conflicting interests of a particularly compelling nature. If a user State but not the littoral State is at war, the State which sends its vessels through the waterway will naturally be anxious to continue that use in time of war. With this interest must be reconciled the desire of the littoral State to maintain its neutrality by precluding the commission of hostile acts and to keep the waterway open for the use of other States. When the littoral State is itself at war, one of its primary concerns must necessarily be for its own safety and for that of the waterway. Its enemy will in all probability be anxious to seize the waterway or to interdict its use or may, on the contrary, desire to continue to draw some of the sustenance for its military activities through it. Opposed to these interests will be those of neutral users of the waterway, whose demands for the free and unfettered use of the waterway can be expected to conflict to a greater or less degree with the littoral State's legitimate interest in defending itself and in waging economic warfare against the enemy.

International law has for the most part not attempted to reconcile these conflicting interests with any precision. As far as international rivers are concerned, the customary law of nations remains silent, for there appears to be no rule of general application which requires that rivers traversing a number of countries be kept open to navigation by ships of all States.[2] Whatever tendency may be observed in the direction of guaranteeing the freedom of navigation of such rivers has been the consequence of conventional arrangements, negotiated for the most part for the purpose of establishing the status of individual rivers.[1] These agreements normally lay down the principle that the river in question is to remain open to navigation by the ships of all nations, but generally limited to the transport of merchandise and passengers.[2] It is only exceptionally, however, that these treaties make any reference to the régime which is to exist in time of war. Article 49 of the Convention Instituting the Statute of Navigation of the Elbe, for example, contents itself with stating that, 'The provisions of the present Convention continue valid in time of war to the fullest extent compatible with the rights and duties of belligerents and neutrals.'[3] The Convention of Mannheim, regulating the status of the most important of European waterways, the Rhine, contains an even more equivocal reference to the 'measures prescribed for the maintenance of the general security'.[4] This absence of provisions having application to periods of war can probably be attributed to the considerations that rivers fall within the domain of land warfare and that their control is not an aspect of maritime strategy. Involved as they are in battle and occupation, it would be unrealistic to suppose that they can be accorded a status differing to any marked degree from that of the shores between which they run.

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[1] The fact that in time of war virtually all shipping passes under governmental control makes it more appropriate to speak of States, rather than shipping companies, as users of international waterways.

[2] See Hyde, *International Law; Chiefly as Interpreted and Applied by the United States* (2nd ed., 1945), vol. i, p. 563; Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1947), p. 421; Ogilvie, *International Waterways* (1920), p. 150. The last of these works contains at p. 173 a valuable reference manual to the treaties, conventions, laws, and other fundamental acts governing the international use of inland waterways.

The legal status of individual straits is regulated in some instances by specific treaty provisions,[5] but it would appear on a statistical basis that in the majority of instances the principle of the free navigation of straits used for international intercourse[1] belongs rather to customary international law.[2] Their standing in law is complicated by the fact that straits in a geographical sense become straits in a legal sense only by reason of the fact that the territorial seas of the littoral State or States meet in such a way that ships passing through the strait must of necessity pass through that portion of the seas subject to national jurisdiction. Additional areas of what would otherwise be the high seas may become part of such territorial waters within straits by reason of the extension by States of the outer limit of the territorial sea in conformity with what appears to be a tendency in the practice of States,[3] or by the enclosure in these same territorial waters of enclaves of the high seas within straits.[4] The special significance of these waterways to international navigation must, however, give their waters an importance over and above that commonly attributed to territorial waters lying off the shore of a nation and must consequently entail a special status for them. The imprecision of treaty provisions regarding passage through international straits in time of war[5] and the resulting necessity of placing heavy reliance upon such law as may have been developed through custom combine to make the practice of States of particular significance in dealing with practical problems relating to the navigation of these waterways by warships and merchant vessels.

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[1] The significant exception is the Barcelona Convention on the Régime of Navigable Waterways of International Concern, opened for signature on 20 April 1921, *L.N.T.S.*, vol. 7, p. 35, Hudson, *International Legislation*, vol. i (1931), p. 638.

[2] E.g., Article 1, Revised Convention for the Navigation of the Rhine, signed at Mannheim, 17 October 1868, Martens, *Nouveau recueil général de traités*, vol. 20 (1875), p. 355, *Rheinurkunden* (1918), vol. ii, p. 80; Articles 1, 22, and 23, Convention Instituting the Definitive Statute of the Danube, signed at Paris, 23 July 1921, *L.N.T.S.*, vol. 26, p. 175; Article 12, Convention Instituting the Statute of Navigation of the Elbe, signed at Dresden, 22 February 1922, *L.N.T.S.*, vol. 26, p. 221; Articles 331 and 332 (Elbe, Oder, Niemen, and Danube), Articles 354 and 356 (Rhine), Treaty of Versailles; Articles 1 and 5, Convention Revising the General Act of Berlin, 26 February 1885, and the General Act and Declaration of Brussels, 2 July 1890, signed at Saint-Germain-en-Laye, 10 September 1919, *L.N.T.S.*, vol. 8, p. 27 (Congo and Niger rivers).

[3] *L.N.T.S.*, vol. 26, p. 221, at p. 241.

[4] Article 1, Revised Convention for the Navigation of the Rhine, signed at Mannheim, 17 October 1868, *supra*.

[5] E.g., the Turkish Straits by the Convention regarding the Régime of the Straits, signed at Montreux, 20 July 1936, *L.N.T.S.*, vol. 173, p. 215; the Straits of Gibraltar by the Declaration respecting Egypt and Morocco, signed at London, 8 April 1904, Martens, *Nouveau recueil général de traités*, 2nd series, vol. 32 (1905), p. 18 (containing merely a reference to 'free passage' in connexion with a prohibition on fortifications); the Danish Sound by the Treaty regarding the Abolition of Danish Sound Dues, signed at Copenhagen, 14 March 1857, Martens, *Nouveau recueil général de traités*, vol. 16 (1858), p. 345 (referring to freedom of navigation by implication only); the Straits of Magellan by the Boundary Treaty between Argentina and Chile, signed at Buenos Aires, 23 July 1881, Martens, *Nouveau recueil général de traités*, 2nd series, vol. 12 (1887), p. 491 (containing in Article V a reference to the free navigation of the Straits by the ships of all nations); the Straits of Formosa by an identic note of the French, German, and Russian Ministers to the Japanese Minister for Foreign Affairs regarding Retrocession of the Liaotung Peninsula, 18 October 1895, MacMurray, *Treaties and Agreements with and concerning China, 1894–1919* (1921), vol. i, p. 53.

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[1] Brüel, *International Straits* (1947), vol. i, pp. 201–2. With the arresting statement 'There are straits and straits', Hyde points out that a distinction must be made between those straits which are 'necessary channel[s] for international commerce or intercourse' and those which are not. It is only the former category with the free passage of which international law has a vital concern. *International Law; Chiefly as Interpreted and Applied by the United States* (2nd ed., 1945), vol. i, pp. 487–9.

[2] An enumeration of straits 'of such interest to the international shipping that they must come within the frame of what is here designated as international straits' appears in Brüel, op. cit., vol. i, pp. 44–45.

[3] For a collection of national legislation of this nature, see United Nations Legislative Series, *Laws and Regulations on the Régime of the High Seas* (1951), vol. i. The International Law Commission of the United Nations has been unable to reach agreement on the breadth of the territorial sea, no less than nine divergent opinions having been expressed by members of the Commission. *Report of the International Law Commission Covering the Work of its Sixth Session*, U.N. Doc. A/CN.4/88, 5 August 1954. Brüel has suggested that States might be authorized to make exceptional extensions of their territorial waters within geographical straits in order to protect the security of the littoral States and to avoid the necessity of making distinctions between territorial waters and contiguous zones in straits. Op. cit., vol. i, pp. 211–13.

[4] Para. 3, Article 13, of the Provisional Articles concerning the Régime of the Territorial Sea, prepared by the International Law Commission in 1954, provides that, '. . . if . . . an area of the sea, not more than two miles in breadth, should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed part of the territorial sea'. *Report of the International Law Commission Covering the Work of its Sixth Session*, U.N. Doc. A/CN.4/88, 5 August 1954, p. 44. It is not claimed that this principle reflects current positive law.

[5] The Convention regarding the Régime of the [Turkish] Straits, signed at Montreux, 20 July 1936, *L.N.T.S.*, vol. 173, p. 215, Articles 4–6 and 19–21 of which contain detailed provisions concerning the passage of merchant ships and warships when Turkey is at war, is a notable exception. The amplitude of these provisions has not, however, prevented a number of vexing legal problems from arising. See *infra*, p. 210.

Freedom of navigation through inter-oceanic canals is uniformly established through international agreement or by the unilateral act of the proprietor of the canal. In the words of the Permanent Court of International Justice in the *Wimbledon* case, an artificial waterway connecting two open seas must be 'permanently dedicated to the use of the whole world' before it may be assimilated to natural straits.[1] It is a consequence of the fact that inter-oceanic canals must be built, maintained, and operated that a permanent dedication to public use must be accomplished by treaty. It would obviously be questionable to expect that the builder of such a waterway should by the very fact of construction be held to a duty of holding the canal open to navigation by all ships of all nations. Thus the Convention of Constantinople of 1888 provides that, 'The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.'[2] Subsequent articles contain provisions designed to secure the neutrality of the Canal in time of war. The extent of the power of Egypt to take measures for its defence is, however, left unclear by related provisions that Egypt, and originally Turkey, may take measures which they 'might find it necessary to take for securing by their own forces the defense of Egypt and the maintenance of public order',[3] but that such acts 'shall not interfere with the free use of the Canal'.[4] The so-called Hay–Pauncefote Treaty of 1901,[5] which regulated the status of the Panama Canal, is hardly more definite. The Canal is to be 'free and open to the vessels of commerce and of war of all nations observing these Rules'[6] but the Treaty is silent with respect to the measures which may be taken by the United States for the defence of the Canal or in time of war.[7] Significantly, the phrase 'in time of war as in time of peace', which appears in the Convention of Constantinople, was not repeated in the Hay–Pauncefote Treaty, which otherwise bears an intentional similarity to the earlier convention.[8] In establishing the status of a third inter-oceanic canal of international concern, the Treaty of Versailles requires that 'The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of complete equality.'[1] In none of these three important agreements are the rights and duties of the proprietor and users of the canal in the event of war made plain.

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[1] *The S.S. Wimbledon, Publications of the P.C.I.J.*, Series A, No. 1, p. 28.

[2] Article 1, Suez Canal Convention, signed at Constantinople, 29 October 1888, Martens, *Nouveau recueil général de traités*, 2nd series, vol. 15 (1891), p. 557.

[3] Article 10.

[4] Article 11.

[5] Treaty between the United States and Great Britain to facilitate the construction of a ship canal, signed at Washington, 18 November 1901, *United States Statutes at Large*, vol. 32, pt. 2, p. 1903, Martens, *Nouveau recueil général de traités*, 2nd series, vol. 30 (1903), p. 601.

[6] Rule 1, Article III.

[7] Rule 2, Article III, which corresponds in its first sentence to Article IV of the Convention of Constantinople of 1888, provides that:

> 'The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.'

[8] The Rules are said in the introductory words of Article III of the Hay–Pauncefote Treaty to be 'substantially as embodied in the Convention of Constantinople, signed the 28th October 1888, for the free navigation of the Suez Canal'.

It may thus be observed that the law relating to international waterways, largely conventional in origin as it is, has to a very large extent failed to concern itself with the common problem of assuring the free passage of such waterways during war, while permitting the defence of the legitimate interests of the State through the territory of which the river or strait or canal in question runs. The answer to this question must therefore be sought in 'international custom, as evidence of a general practice accepted as law'.[2] The recent practice of States is of primary importance to this inquiry, since ancient precedents lose their relevance with the immense changes which have taken place in the grim art of waging war.[3]

I. *When the littoral or riparian State is not at war*

During a war to which the State through which an international waterway passes is not a party, such a State rests under certain obligations which are the consequence of its neutral status. Conscious of the responsibilities imposed upon them by the existence of the passage and solicitous of their own defence, littoral States have in practice generally discharged their duties as neutrals in conformity with law. In so far as warships are concerned, the primary concern of the riparian States must normally be to prevent the commission of hostile acts within or in the vicinity of the waterway, while permitting the free passage of all ships, whether merchant vessels or warships, belligerent or neutral. In exceptional cases, dictated either by the facts of geography or of politics, the responsibility of the littoral State may, however, extend to denying passage to certain categories of ships.

The very scarcity of State practice[4] and of jurisprudence relating to the passage of warships through international straits, far from suggesting any lacuna in the law of nations relating to this subject, indicates that restrictions are placed on such passage only as an exceptional measure.

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[1] Article 380.

[2] Article 38, para. 1 (*b*), of the Statute of the International Court of Justice.

[3] To this latter category probably belongs the incident which took place in the Suez Canal in 1870. On 15 August of that year, the birthday of the Emperor, a French warship, which had dressed ship for the occasion, encountered a German warship in Lake Timsah, midway in the Canal. Notwithstanding the existence of a state of war between the two countries, the German vessel saluted the French warship.

[4] Brüel, *International Straits* (1947), vol. i, p. 111.

During the Second World War, the Straits of Gibraltar were freely used as an avenue of approach for warships during the invasion of North Africa.[1] While they had been blockaded during an earlier stage of the war, the Prime Minister had insisted that Spanish territorial waters should not be violated in the course of this process.[2] In the previous World War, Chile had declared the whole of the Straits of Magellan to be within its territorial waters[3] but did not interdict the passage of warships.[4] The act of a British warship in capturing the *Bangor*, a Norwegian merchant vessel chartered to carry supplies to a German cruiser, within the Straits was of doubtful compatibility with the Treaty of 1881 between Argentina and Chile, which had both declared them open to the shipping of all nations and had neutralized them.[5] In prize proceedings for the recovery of the vessel, the Court quite properly held that any possible violation of Chilean neutrality resulting from a capture in neutral waters could be asserted only by Chile and could not be the basis for the restoration of the ship to its owners.[6] Prior to the First World War, Denmark and Sweden allowed warships to pass freely through the Danish Straits between the Baltic and the North Sea during the Crimean War, the Franco-Prussian War of 1870, the Russo-Turkish War, and the Russo-Japanese War.[7] Denmark refused to accede to a British request during the first of these wars that the Straits be closed to belligerent ships of war.[8] The neutrality rules of the two countries, promulgated in 1912, reserved from the areas which might be closed to foreign warships in time of war those portions of the Straits necessary to the passage of ships.[9] Under pressure from Germany and in order to protect herself from belligerent activities which might be conducted in close proximity to Danish territory by reason of the strategic importance of this passage to the Baltic, Denmark mined the three passages of the Straits (the Sound, the Great Belt, and the Little Belt) early in the First World War. The passage of warships was prohibited, and none in fact passed through the mine-fields which had been laid. Merchant vessels were permitted through the mine-fields by day and under pilotage.[1] Prior to the Second World War, Denmark and Sweden again adopted, pursuant to an agreement between the Scandinavian States,[2] rules of neutrality, which authorized belligerent vessels to traverse 'the natural routes of traffic between the North Sea and the Baltic Sea'.[3] With the outbreak of the Second World War and the occupation of Denmark by German forces, the Straits became the scene of vigorous efforts at interdiction through the laying of a net barrage and mines—activities in which both German and Allied forces participated.[4]

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[1] Morison, *Operations in North African Waters, October 1942–June 1943*, vol. ii of *History of United States Naval Operations in World War II* (1947), p. 191. There was considerable fear about the ability of Spain, in a military sense, to close the Straits. Op. cit., p. 187.

[2] Prime Minister to General Ismay for C.O.S. Committee, 13 October 1940, in Churchill, *Their Finest Hour* (Boston, 1949), p. 502.

[3] Decree of 15 December 1914, in *Boletin de las leyes i decretos del gobierno*, 83 (1914), p. 1660; French translation in *Revue générale de droit international public*, 23 (1916), Documents, p. 13.

[4] Both British and German warships passed through the Straits. Brüel, *International Straits* (1947), vol. ii, p. 249.

[5] As cited in n. 5, p. 189, *supra*.

[6] *The Bangor*, [1916] P. 181, 185. The case is discussed in Brüel, *International Straits* (1947), vol. ii, at pp. 246–8; see also Mathlieu, 'The Neutrality of Chile during the European War', in *American Journal of International Law*, 14 (1920), p. 319, at p. 327.

[7] Smith, *Great Britain and the Law of Nations*, vol. ii (1935), pp. 262–3, 267; Brüel, op. cit., vol. ii, pp. 55–56. It is difficult to agree with Brüel's conclusion that the practice of Denmark and Sweden created only a 'presumption' that the Straits should be left open to passage by warships in time of war.

[8] Smith, op. cit., p. 262.

[9] Para. 1, Royal Order No. 293 Concerning the Neutrality of Denmark in Case of War between Foreign Powers, 20 December 1912, *Lovtidende for Kongeriget Danmark* (1912), p. 1342, Deák and Jessup, *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries* (1939), vol. i, p. 476; Royal Ordinance No. 346 Concerning the Neutrality of Sweden in Case of War between Foreign Powers, 20 December 1912, *Svensk Författningssamling* (1912), p. 853, Deák and Jessup, op. cit., vol. ii, p. 963.

The complete closure of straits by a littoral State has been effected in other instances, particularly when the geographical nature of the strait is such as to require its closing to protect the adjacent territory of a neutral State from the hazards of warfare. The Straits of Messina were thus completely closed to warships by Italy during the period of that country's neutrality in the First World War.[5] Considerations of history have, moreover, combined with those of geography to place the Turkish Straits in a peculiar position, which has no exact counterpart in the case of other waterways. Some survival of the ancient concept of the Black Sea as a *mare clausum* is to be found in those provisions of the Montreux Convention which forbid the warships of belligerents to pass through the Turkish Straits in time of war when Turkey is not a belligerent. Exceptions are made in those instances in which the vessels are assisting in the defence of a State linked with Turkey in a treaty of mutual assistance, are carrying out the obligations of a State under the Covenant of the League of Nations, or are returning to bases from which they have become separated.[6] The basis for this prohibition of transit in time of war lies in the considerations that the Straits could hardly fail to become the scene of active hostilities if warships were allowed to pass freely through them and that a right of free passage for the warships of Black Sea Powers alone would transform the Black Sea into a sanctuary whence no vessels of war of a non-riparian State might follow. In this latter event, strategic necessities could induce a non-riparian State to embroil Turkey in the war either as an enemy or as an ally of the nation seeking access to the Black Sea.[1] While the prohibition has certain defensive advantages for Russia, that nation has, as its strength has increased in recent years, made a number of efforts to alter the terms of the Montreux Convention in such a way as to give it free access through the Straits in time of war and to allow it to participate in the defence of the Straits themselves.[2]

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[1] See Brüel, *International Straits* (1947), vol. ii, pp. 59–78.

[2] Declaration by Denmark, Finland, Iceland, Norway, and Sweden regarding Similar Rules of Neutrality, signed at Stockholm, 27 May 1938, *L.N.T.S.*, vol. 188, p. 293.

[3] Royal Order No. 209, 31 May 1938, *Lovtidende for Kongeriget Danmark* (1938), p. 1064, *L.N.T.S.*, vol. 188, p. 297; Royal Ordinance No. 187, 27 May 1938, *Svensk Författningssamling* (1938), p. 373, *L.N.T.S.*, vol. 188, p. 297.

[4] *The Times* newspaper, 13 April 1940, p. 5, col. 2; 1 May 1940, p. 7, col. 3; 30 April 1943, p. 4, col. 6.

[5] Avis du ministre de la marine sur la navigation dans le détroit de Messine, 30 May 1915, *Journal officiel de la République française*, 1 June 1915, p. 3518, *Revue générale de droit international public*, 22 (1915), Documents, p. 216.

[6] Articles 19 and 25, Convention regarding the Régime of the Straits, signed at Montreux, 20 July 1936, *L.N.T.S.*, vol. 173, p. 215.

The ability of Turkey to enforce the provisions of the Montreux Convention relating to passage of ships through the Straits in time of war followed in large measure from the capacity of that country to maintain its neutrality through the greater portion of the Second World War.[3] The desire of the belligerents to permit warships to pass through the Straits was, indeed, one of the motives for attempting to induce Turkey to alter that firm position of neutrality which it had adopted. When plans were being laid for the Yalta Conference, Mr. Churchill pointed out to President Roosevelt that one of the difficulties in holding the projected meeting at that spot would be that warships would not be able to pass through the Dardanelles and Bosporus, Turkey not yet being at war with Germany. He suggested that Turkey might be persuaded either to enter the war or to waive the provisions of the Treaty of Montreux.[4] The arrangements ultimately arrived at involved the passage of four mine-sweepers and two non-combatant auxiliary vessels, which were to furnish communications and other services to the Conference. To preclude any embarrassment in the passage of these vessels through the Straits, prior notice had been given to the Turkish Government, and its permission presumably obtained.[5] The lawfulness of the passage of the Straits by these vessels is dependent upon the characterization of these and other ships as 'vessels of war' or as belonging to other categories under the Montreux Convention. Despite the clarity of the provisions of that Convention which govern the passage of both warships and merchant vessels in time of war, attempts to evade the prohibitions of the agreement and certain lacunae in the categorization of vessels in Annex II to the Treaty[1] were the occasion, as in the case of the vessels which entered the Black Sea in connexion with the Yalta Conference, of much diplomatic correspondence. These problems of characterization must be left for separate consideration later in this article.[2] If these difficult questions are left aside, there appears to be little doubt that Turkey administered the provisions of the Montreux Convention with due regard for its dual role as a neutral and as the guardian of the Straits.[3] The mining of their waters undoubtedly had considerable influence in persuading the belligerents that it would not be to their advantage to attempt to force a passage through the Straits.[4]

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[1] Ahmed Sükrü Esmer, 'The Straits: Crux of World Politics', in *Foreign Affairs*, 25 (1946–7), p. 290, at pp. 301–2.

[2] A note from the Soviet Chargé at Washington to the U.S. Acting Secretary of State, 7 August 1946 (see Howard, *The Problem of the Turkish Straits* (Department of State Publication 2752, Near Eastern Series 5, 1947), pp. 47–49), proposed the joint defence of the Straits by Russia and Turkey in order to prevent their utilization by 'other countries for aims hostile to the Black Sea powers'. The territorial claim of Russia was withdrawn in a new Soviet note to Turkey on 30 May 1953. See Howard, 'The Development of United States Policy in the Near East, South Asia and Africa during 1953: Part I', in *Department of State Bulletin*, 30 (1954), pp. 277–8. See also Smith, *My Three Years in Moscow* (1950), p. 53, regarding Stalin's desire for bases in the Dardanelles, and Bilsel, 'The Turkish Straits in the Light of Recent Turkish–Soviet Russian Correspondence', in *American Journal of International Law*, 41 (1947), p. 727, at p. 743.

[3] See generally Bilsel, 'International Law in Turkey', in *American Journal of International Law*, 38 (1944), p. 546.

[4] Cable from Mr. Churchill to President Roosevelt, 23 October 1944, in the *New York Times* newspaper, 17 March 1955, p. 41, col. 8.

[5] Memorandum from the President's Naval Aide to the Chief of Staff to the Commander-in-Chief of the United States Fleet, 3 January 1945: see *New York Times* newspaper, 17 March

The legal analogies which have been drawn between straits used as avenues of maritime communication and inter-oceanic canals suggest that there should be some similarity in the legal régime and in the resulting practice of States as regards their passage by warships when the littoral nation is neutral.[5] Of the existing inter-oceanic canals, that of Suez, opened to traffic in 1869, has by reason of its age been productive of a larger body of precedent than any other inter-oceanic canal. The concessions which had been granted to the Compagnie Universelle du Canal Maritime de Suez by the Viceroy of Egypt had stipulated for the Canal a neutral status but, as regards its passage by shipping, referred only to merchant vessels.[6] Nevertheless, the ships of the belligerent Powers passed freely through the Canal during the Franco-Prussian War.[7] With the adoption of the Conven-

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1944, p. 43, col. 8; Memorandum from the President's Chief of Staff to the President, 13 January 1945, ibid., p. 44, col. 8; Cable from Mr. Churchill to President Roosevelt, 13 January 1945, ibid., p. 44, col. 8.

[1] *L.N.T.S.*, vol. 173, p. 235. The wording is taken from the London Naval Treaty of 25 March 1936.

[2] See p. 210, *infra*.

[3] With regard to the application of the Montreux Convention by the Turkish Government, Mr. Bevin stated in the House of Commons on 22 October 1946 that His Majesty's Government were of the view that 'on the whole, its terms had been conscientiously observed': *Official Report*, vol. 427 (1945–6), col. 1495. But cf. the view of Tchirkovitch in 'La Question de la révision de la Convention de Montreux concernant le régime des Détroits Turcs; Bosphore et Dardanelles', in *Revue générale de droit international public*, 56 (1952), p. 189, at p. 202, that the application of the Convention gave no satisfaction to the Allies during the Second World War.

[4] *The Times* newspaper, 4 March 1941, p. 4, col. 2.

[5] See *The S.S. Wimbledon, Publications of the P.C.I.J.*, Series A, No. 1, p. 28, assimilating canals to natural straits.

[6] First Act of Concession, 30 November 1854, *Recueil chronologique des actes constitutifs de la Compagnie Universelle du Canal Maritime de Suez* (1950), p. 2; Firman of Concession, 5 January 1856, ibid., p. 6.

[7] Hallberg, *The Suez Canal* (1931), p. 281.

tion of Constantinople of 1888, which required that the Canal be kept open 'in time of war as in time of peace, to every vessel of commerce or of war' and bound the signatories to refrain from acts of hostility within and about the Canal,[1] a somewhat firmer legal foundation was laid for the free transit of the Canal by warships. Subsequent practice has given some indication that States not parties to the Convention may also avail themselves of the privilege of sending their warships through the Canal,[2] but it is not altogether clear to what extent the agreement created duties incumbent upon non-signatories. There is room for the view that a State which takes advantage of the privilege of passing through the waterway thereby assumes the correlative obligations of the Convention regarding abstention from belligerent acts in the Canal and its approaches. In later wars in which Egypt and Great Britain remained neutral, the Canal was freely used by the warships of nations at war. The Spanish Reserve Fleet passed through in inglorious fashion in 1898,[3] and in the Russo-Japanese War Great Britain allowed Russian warships to proceed through the Canal in order to engage in hostilities with Japan, then allied with Great Britain.[4] Italian war-vessels passed through the Canal in 1911 during that country's war with Turkey in spite of the latter country's position *vis-à-vis* Egypt.[5] During the two World Wars, Egypt has itself been in a belligerent status, and measures, especially of a military nature, were taken to ensure that enemy ships did not pass through the Canal. No restrictions appear to have been placed on the passage of warships during the recent conflict in Korea, or in the Italo-Abyssinian hostilities prior to the Second World War. The question of the passage of Italian shipping to assist in Italy's aggression against Ethiopia more properly belongs, however, to the consideration of the closing of international waterways as a sanction against an aggressor State.[6]

For that period of both World Wars during which the United States was a neutral, warships of the belligerents were permitted to use the Panama

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[1] Articles 1 and 4, Suez Canal Convention, signed at Constantinople, 29 October 1888, Martens, *Nouveau recueil général de traités*, 2nd series, 15 (1891), p. 557.

[2] In 1898, the United States, which was not a party to the Convention of Constantinople, caused inquiries to be made of the British Government concerning its attitude toward the use of the Suez Canal for the passage of United States warships. The United States Ambassador reported to his Government that, 'The attitude of the British Government is that we are unquestionably entitled to the use of the canal for war ships.' The Department of State replied that it had not been disposed to rely upon, or formally to appeal to, the Convention, since the United States was not one of the signatory Powers. *Foreign Relations of the United States*, 1898 (1901), pp. 982–3.

[3] Chadwick, *The Relations of the United States and Spain: The Spanish American War*, vol. ii (1911), p. 388; Le Fur, 'Chronique des faits internationaux, Espagne et États-Unis', in *Revue générale de droit international public*, 6 (1899), pp. 196, 216–18.

[4] Hershey, *The International Law and Diplomacy of the Russo-Japanese War* (1906), pp. 189. 191–2; Rapisardi-Mirabelli, 'La Guerre italo-turque et le droit des gens', in *Revue de droit international et de législation comparée*, 2nd series, 15 (1913), pp. 85, 115.

[5] Hallberg, *The Suez Canal* (1931), p. 301.

[6] See p. 208, *infra.*

Canal. A United States Proclamation of 13 November 1914[1] gave effect to the provisions of the Hay–Pauncefote Treaty by establishing rules limiting the number of belligerent warships[2] in the Canal, prescribing their order of departure, and prohibiting the furnishing of supplies, in order to preclude the commission of hostilities in the Canal and thus to guarantee that the waterway would 'remain free and open on terms of complete equality to vessels of commerce and of war'. A similar proclamation was issued at the outbreak of the Second World War.[3] Both regulations required that the total number of vessels of war of each belligerent and its allies should not exceed three and limited to six the total number of warships which were permitted within the Canal and the territorial waters of the Canal Zone at any one time.[4] Commanding officers of public vessels of both belligerent and neutral nations were in the Second World War required to give written assurances that the rules, regulations, and treaties of the United States would be faithfully observed.[5] Since prizes were assimilated to vessels of war by the Hay–Pauncefote Treaty and by the proclamations of neutrality, no difficulty was presented by the passage of a German merchant vessel, the *Duesseldorf*, under a British prize crew in December 1939.[6]

Although armed public vessels have been employed on international rivers, no significant practice with regard to their passage through neutral riparian States in time of war appears to have been reported. This circumstance is probably attributable to the fact that many of the principal instruments opening international rivers to free navigation by all States make reference only to the use of the rivers for commercial purposes. The very document which established the European policy of opening rivers to free navigation by the ships of all nations, the Articles Concerning the Navigation of Rivers adopted by the Congress of Vienna, contains the qualifying phrase 'sous le rapport de commerce'.[7]

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[1] See *United States Statutes at Large*, vol. 38 (1913–15), pt. 2, p. 2039.

[2] Auxiliary vessels were dealt with separately in the Proclamation of 1914, but for most purposes the two categories were both expressly mentioned and then treated in the same way. An auxiliary vessel was not identified in that fashion but fell within a class defined as a ship, not being a vessel of war, which 'is employed by a belligerent Power as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities'. Rules 1 and 2, Proclamation of 13 November 1914. However, in the case of the new proclamation on the Panama Canal issued in 1939, the general neutrality proclamation of the United States (Proclamation No. 2348, 5 September 1939, *Federal Register*, vol. 4 (1939), p. 3809, at p. 3811) had provided that 'The provisions of this proclamation pertaining to ships of war shall apply equally to any vessel operating under public control for hostile or military purposes.' The neutrality proclamation having specific application to the Canal Zone was designed to modify Proclamation No. 2348 in its application to the Panama Canal, and references to 'belligerent ships of war' in the Canal Zone instrument must therefore be read in the light of the definition in the general neutrality proclamation.

[3] Proclamation No. 2350, *Federal Register*, vol. 4 (1939), p. 3821.

[4] Rule 10, Proclamation of 13 November 1914; para. 2, Proclamation No. 2350.

[5] Paragraph 2, Executive Order 8234, 5 September 1939, *Federal Register*, vol. 4 (1939), p. 3823.

[6] Padelford, *The Panama Canal in Peace and War* (1943), pp. 161–2.

[7] See Article II, Articles concernant la navigation des rivières qui dans leur cours navigables

The restrictions which have been placed by neutral riparian States upon the navigation of international waterways by the merchant vessels of belligerent Powers have been considerably less stringent than those imposed upon vessels of war and auxiliaries, in all probability because of the lesser capacity of these vessels to engage in belligerent acts while in transit. Despite the mining of the Danish Straits during the First World War and their prohibition to vessels of war, some 32,084 merchant ships were escorted through the mine-fields laid in the Great Belt.[1] The closing of the Straits thus had application to warships alone. The action of Denmark in permitting the passage of merchant vessels was fully consistent with the policy which had been followed by Denmark and Sweden during the wars of the previous seventy years in which the two countries had remained neutral.[2] Article 4 of the Montreux Convention places upon a conventional basis the right of merchant vessels to enjoy freedom of transit and navigation in the Turkish Straits in time of a war in which Turkey is not a belligerent. Mining and other defensive measures undertaken by that country during the Second World War required, however, that, notwithstanding the provision of the Convention that pilotage remains optional,[3] the use of Turkish pilots be made mandatory.[4] These measures taken in conjunction with the sanitary inspection required by the Convention[5] made it possible for Turkey to inspect ships applying for passage in order to ascertain whether they were indeed merchantmen.[6] The amount of Axis shipping which used the passage was substantial, but underwent sharp variations as the fortunes of war shifted.[7] As the result of control of the Aegean by Germany, Italy,

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séparent ou traversent différents états, Acte du Congrès de Vienne, signed 9 June 1815, Martens, *Nouveau recueil de traités*, vol. 2 (1818), p. 361, at p. 414. And see Article 327 of the Treaty of Versailles, which refers to equality of treatment in the use of German inland waterways in connexion with the transport of goods and passengers.

Cf. Article 6, Treaty between Brazil and Colombia regarding Frontiers and Inland Navigation, signed at Rio de Janeiro, 15 November 1928, *British and Foreign State Papers*, vol. 129 (1933), p. 262, which permits 'transports and vessels of war' of the one State to navigate freely on that portion of the waters of common rivers under the jurisdiction of the other State. During the Leticia dispute, Colombia sent a flotilla of vessels 2,100 miles up the Amazon: see Woolsey, 'The Leticia Dispute between Colombia and Peru', in *American Journal of International Law*, 27 (1933), p. 317, at p. 318.

[1] Brüel, *International Straits* (1947), vol. ii, p. 74.

[2] Brüel, op. cit., vol. i, p. 111.

[3] Article 2.

[4] *The Times* newspaper, 4 March 1941, p. 4, col. 2. In a Soviet note to the Turkish Ministry of Foreign Affairs of 24–25 September 1946, reference is made to notices to mariners dated 25 February and 6 May 1941 and 27 June 1942: see Howard, *The Problem of the Turkish Straits* (Department of State Publication 2752, Near Eastern Series 5, 1947), pp. 55–58. The denial of pilotage through mined waters was tantamount to a refusal to permit the passage of the vessel, as the Tarvisio affair (see p. 211, *infra*) made clear. See *The Times* newspaper, 18 August 1941, p. 3, col. 4.

[5] Article 3.

[6] *The Times* newspaper, 16 June 1944, p. 4, col. 5; 17 June 1944, p. 4, col. 5. See the remarks of Mr. Eden in the House of Commons, 21 June 1944, in *Official Report*, vol. 401 (1943–4), col. 167.

[7] *The Times* newspaper, 22 May 1941, p. 3, col. 3; 11 October 1943, p. 4, col. 7; 27 November 1943, p. 3, col. 5; 14 January 1944, p. 3, col. 4; 10 January 1944, p. 4, col. 5; 15 March 1944, p. 3, col. 4.

Hungary, and Roumania, no Allied shipping was seen in the Straits until 1945, when such traffic was resumed,[1] and there is reason to suppose that the use of the Straits by only one of the belligerent parties during any given period had much to do with simplifying the role of Turkey as the guardian of the waterway.

The little difficulty which has been encountered in securing the free passage of warships through international waterways traversing neutral States correctly suggests that the passage of merchant vessels should present even less of a problem. The Suez Canal Convention holds the waterway open to 'every vessel of commerce or of war . . . in time of war as in time of peace',[2] but the corresponding provision of the Hay–Pauncefote Treaty[3] omits the phrase regarding times of war and peace. Nevertheless, there appears to have been no denial of transit to belligerent merchant vessels during periods when Egypt or the United States has been neutral. While no quantitative restrictions have been placed on such ships passing through the Panama Canal, the United States has adopted measures for the protection of the waterway. These have included the requirement that cameras be sealed,[4] a prohibition on the use of wireless sets,[5] the placing of armed guards on merchant vessels in transit through the Canal,[6] and the granting of authority to take possession and control of vessels if necessary to prevent damage or injury to ships or the Canal or 'to secure the observance of the rights and obligations of the United States'.[7] Under such regulations, belligerent merchantmen have continued to use the Canal freely while the United States has been neutral.[8] Since the case of *The S.S. Wimbledon*,[9] the obligation of a neutral littoral State to allow transit of artificial waterways by merchant ships carrying contraband of war to belligerent States has been undisputed. That judgment, rendered with respect to the passage of a British ship carrying arms to Danzig through the Kiel Canal, has a wider significance than its facts alone would indicate, for the Court both assimilated international canals to natural straits and also emphasized that even the passage of a belligerent warship through such waterways would not compromise the neutrality of the State in whose jurisdiction the waters lie. There is nothing, however, in the Judgment of the Permanent Court of International Justice which would suggest that a State is precluded from taking reasonable measures for the protection of the waterway and of its own neutrality, even though these may impose some burdens upon shipping using the waterway.

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[1] Bilsel, 'International Law in Turkey', in *American Journal of International Law*, 38 (1944), p. 546, at p. 553; *The Times* newspaper, 18 January 1945, p. 3, col. 5.

[2] Article I, Suez Canal Convention, signed at Constantinople, 29 October 1888, as cited *supra* in n. 1, p. 197.

[3] Article III, Rule 1, Treaty between the United States and Great Britain to facilitate the construction of a ship canal, signed at Washington, 18 November 1901, as cited *supra* in n. 5, p. 191.

[4] Executive Order No. 8382, 25 March 1940, *Federal Register*, vol. 5 (1940), p. 1185.

[5] Executive Order No. 8715, 18 March 1941, *Federal Register*, vol. 6 (1941), p. 1531.

[6] Regulation of the Acting Governor of the Panama Canal, 'Inspection and Control of Vessels in Canal Zone Waters', approved by the President on 8 July 1941, *Federal Register*, vol. 6 (1941), p. 3407.

[7] Executive Order No. 10226, 23 March 1951, *Federal Register*, vol. 16 (1951), p. 2673.

[8] Padelford, *The Panama Canal in Peace and War* (1943), pp. 133, 169.

[9] *The S.S. Wimbledon*, *P.C.I.J.*, Series A, No. 1,

The shipment of sand and gravel and of coal, minerals and metals on the Rhine between Germany and occupied Belgium during the First World War placed the Netherlands in a difficult position, beset as it was by the conflicting demands of Germany, which desired to employ this route of transport, and of Great Britain, which protested against the use of neutral territory for this purpose.[1] In this controversy, which centred about the interpretation of Article 2 of Convention No. V of The Hague of 1907, prohibiting the movement of convoys of munitions of war or supplies across the territory of a neutral Power, reference was also made to Article 2 of the Act of Mannheim of 1868.[2] The contention was made by both the Netherlands and Germany that that provision, which authorized a free choice of routes through the Netherlands from the Rhine to the sea, justified the passage of boats carrying the products mentioned. However, the agreement of 1868 must be read in the context of its authorization of free passage for ships engaged in commerce, as had historically been the case with regard to the navigation of the Rhine.[3] Indeed, it would seem that freedom of navigation on that river is limited, both in war and peace, to commercial shipping. Retorsion by the British Government ultimately led to the placing of restrictions on the shipments by the Netherlands, and it is not possible to say that the incident can form the basis for any definitive interpretation of the Act of Mannheim.

From the foregoing survey, which has necessarily been of a summary nature, it is possible to draw certain conclusions regarding the right of warships and merchant ships to pass through international waterways when the littoral or riparian State is neutral. Warships have the right to pass through international waterways which have been dedicated to public use without compromising the neutrality of the littoral State. The littoral State may, however, take necessary reasonable measures for the protection of the waterway and of its neutrality, including the prohibition of belligerent acts within the waterway itself. The success of littoral States in keeping interoceanic canals open to transit by belligerent warships suggests that neutral

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[1] *Further Correspondence Respecting the Transit Traffic Across Holland of Materials Susceptible of Employment as Military Supplies*, Misc. No. 17 (1917), Cmd. 8693; de Visscher, 'Chronique des faits internationaux', in *Revue générale de droit international public*, 2nd series, vol. 26 (1919), pp. 142 ff.

[2] Revised Convention for the Navigation of the Rhine, signed at Mannheim, 17 October 1868, as cited *supra* in n. 2, p. 189.

[3] See Articles concernant la navigation du Rhin, 9 June 1815, in *Rheinurkunden* (1918), vol. i, p. 43, especially Article I.

States have on occasion acted unreasonably, and perhaps unlawfully, in placing a complete prohibition on the pasaage of straits by belligerent warships. The practice of States, confirmed by international agreements and by judicial precedent, also establishes that ships of belligerent States or carrying contraband for their use may pass through international canals or straits in time of war, without prejudice, however, to the right of the neutral littoral State to impose reasonable regulations for its protection. As the great majority of international rivers have been opened only to commercial use, exception must be made in such cases. It is highly questionable whether the portion of such waterways lying within neutral territory may be used in time of war for other than ordinary commercial traffic, which, under modern conditions, may disappear altogether in time of war. In this respect, such waterways appear to be governed by the law of neutrality in land warfare[1] rather than by any body of principles having application to waterways connecting stretches of the high seas.

II. *When the littoral or riparian State is at war*

The outbreak of a war to which a State through whose territory an international waterway runs is a party, is productive of conflicting demands of a practical order. On the one hand, the State in question must, as a minimum, be accorded the right to take the measures necessary for its self-defence; it may also demand legal authority to take offensive measures against enemy shipping or shipping carrying contraband which finds its way into the waterway. Opposed to these requirements is the desire of neutral States to continue to utilize the waterway for the passage of both vessels of war and merchant ships, notwithstanding the existence of the war in which the littoral State is engaged. In conformity with modern tendencies in the conduct of war, the practice relating to passage through international waterways lying within belligerent territory appears to take increasing account of the need of the territorial sovereign to take defensive measures.

Straits possess a strategic importance which frequently makes them a scene of active hostilities, whether on land[2] or at sea. This circumstance, and the significance they have as part of the line of communications of belligerents, make it altogether unrealistic to suppose that a belligerent littoral State is required to allow passage to enemy warships and other vessels bent on hostile missions. It is for this reason that States rarely find it necessary to promulgate any legal instrument expressly closing a waterway to enemy warships.[1]

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[1] Hague Convention No. V of 1907 respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, in *The Reports to the Hague Conferences of 1899 and 1907* (Scott ed., 1917), p. 533.

[2] E.g., the Straits of Messina in the invasion of Italy during the Second World War. See Morison, *Sicily–Salerno–Anzio, January 1943–June 1944*, vol. ix in *History of United States Naval Operations in World War II* (1954), pp. 201–24.

The commonest method for interdicting passage through natural straits, i.e. the laying of mines, is merely a special application of the device of mining areas of the high seas, to which belligerents in recent wars have increasingly resorted.[2] Indeed, the laying of extensive mine-fields in the approaches to straits diminishes the practical importance of the question of the legality of the blocking of the straits themselves by these means. By way of example, not only the Danish Sound was mined in the Second World War but the whole of the Skagerrak and Kattegat, with the exception of a channel twenty miles in breadth and the territorial waters of Sweden.[3] Reports of post-war mine-lifting operations indicate to what a tremendous extent avenues of international commerce and communication, such as the Straits of Dover, had been blocked.[4] Such measures as these naturally have the effect of prohibiting passage not only to enemy warships and merchant shipping serving the enemy but to neutral vessels of commerce and warships as well. The widespread use of mines, especially in narrow waterways, suggests possible practical difficulties in giving effect to the principle enunciated by the International Court of Justice in the *Corfu Channel* case.[5] The Court took account of the fact that Greece considered herself to be technically in a state of war with Albania and that disputed claims existed with respect to territory bordering on the Corfu Channel, and to this extent may have grounded its conclusions on the assumption that Albania may have been in a *de facto* state of war. If this is so, the conclusion of the Court that Albania would have been justified in issuing regulations regarding the passage of warships through the Strait, 'but not in prohibiting such passage or in subjecting it to the requirement of special authorization',[6] may justify the conclusion that it is unlawful for a belligerent littoral State to block passage through a strait by the laying of mines, even if the possibility is held out that authorized ships would be escorted through the mine-field. It might, on the other hand, be more reasonable to suppose that the Court was announcing that the restrictions adopted must bear some reasonable relation to the danger to be averted and that the nature of the war may determine the extent to which mines may be laid and passage prohibited.[1] There is some basis for concluding that a belligerent is under an obligation to provide passage, subject to reasonable measures of security and control such as compulsory pilotage and navigation by day, to neutral vessels and that it may completely block passage of a strait only as a last resort in the most urgent and compelling of circumstances.

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[1] In Royal Decree No. 595, 6 June 1940, *Raccolta Ufficiale delle Leggi e dei Decreti del Regno d'Italia* (1940), vol. ii, p. 1551, Italian territorial waters, which would include the Straits of Messina, were closed to all foreign vessels of war, including apparently the warships of neutrals as well.

[2] Stone, *Legal Controls of International Conflict* (1954), pp. 472–5, 583–5; Spaight, *Air Power and War Rights* (3rd ed., 1947), pp. 492–5.

[3] *The Times* newspaper, 13 April 1940, p. 5, col. 2; Stone, op. cit., p. 573, n. 11. The German forces laid a net barrage in the Great Belt but supplied no pilots to assist ships in entering the narrow passage through it. *The Times* newspaper, 1 May 1940, p. 7, col. 3.

[4] Third Interim Report by the International Central Board (1 October 1946 to 30 June 1947), in *The Corfu Channel* case, *Documents (1949)*, vol. 5, pp. 9 ff. This report refers to the lifting of mines in the Skagerrrak, the Kattegat, the Baltic Straits, the English Channel, the Kerch Strait and the Irbensky Strait, among others.

[5] Judgment of 9 April 1949: *I.C.J. Reports*, 1949, p. 4.

[6] Ibid. at p. 29.

Despite the neutralized status of the Suez and Panama Canals, they, like international straits, have been caught up in hostilities and have been defended by those States for whom these waterways possess special importance. During the First World War, shipping bound for the Suez Canal was attacked by German submarines in the Mediterranean, and traffic to and from the Far East had, as a result, to be diverted to the Cape route.[2] A land attack by Turkish forces was repelled.[3] At the beginning of the Second World War, British warships denied access to the Canal to Italian vessels of war and merchant shipping,[4] and for the most part the enemy's attack upon the Canal was confined to aerial bombardment and the dropping of mines in the Canal.[5] Although the Panama Canal is, in the literal language of the Hay–Pauncefote Treaty, free and open to the vessels of all nations in time of war, neutralized, and immune from attack by any belligerent,[6] it has proved impossible to give effect to these provisions in so far as they may confer rights upon an enemy of the United States. Proclamations of the President of the United States have expressly denied access to the Canal to the vessels of war, auxiliary vessels, and private vessels of enemies of that country.[7] United States naval forces were deployed about the Canal during the Second World War in order to protect its sea approaches from attack by either Japanese or German warships, but were not successful in the early stages of the war in preventing frequent sinkings of merchant vessels by enemy submarines operating in the vicinity of the waterway.[1] In practice, the measures which were set in motion to prevent attack on the Canal by enemy warships were taken, not within the Canal or its territorial waters, but at considerable distances out on the high seas. The provisions of the Treaty which might extend a right of free passage to enemy ships and which give the Canal a neutralized status must accordingly be considered, in legal as well as in practical effect, to have yielded to the realities of the strategic importance of inter-oceanic canals and of the manner in which modern wars are fought. It is not surprising, therefore, that in 1937 Germany, conscious of the importance of the Kiel Canal to its projected military adventures, closed that canal to the warships and naval craft of all foreign States, except when permission for passage had been obtained through diplomatic channels.[2] One is forced to agree with Professor Siegfried that the Panama and Suez Canals in particular are no longer neutral, that they are defended by the interested States in their own interest, and that freedom of passage ceases to exist in time of war.[3]

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[1] Thus the Great Belt and the Skagerrak were opened to free usage by all nations shortly after the termination of hostilities in the Second World War, notwithstanding the continuation of a technical state of war. See the statement by Mr. Bevin in the House of Commons on 21 February 1946, in *Official Report*, vol. 419 (1945–6), col. 1356.

[2] Hallberg, *The Suez Canal* (1931), pp. 345–8.

[3] Douin, *L'Attaque du Canal de Suez (3 février 1915)* (1922).

[4] *The Times* newspaper, 13 June 1940, p. 5, col. 2.

[5] Compagnie Universelle du Canal Maritime de Suez, *The Suez Canal* (1952), pp. 53–62; 'Compagnie Universelle du Canal de Suez', in *Collection économie du monde* (1947), pp. 75–77.

[6] Article III, Rules 1, 2, and 6, Treaty of 18 November 1901 between the United States and Great Britain, as cited *supra* in n. 5, p. 191; see Arias, *The Panama Canal: A Study in International Law and Diplomacy* (1911), p. 126.

[7] Proclamation of 23 May 1917, *United States Statutes at Large*, vol. 40 (1917–19), pt. 2, p. 1667, which is still in force. Code of Federal Regulations, Title 35, § 4.176. Vessels of other belligerents are subjected to certain restrictions while passing through the Canal, and their commanding officers must give written assurance to the Canal authorities that the relevant rules and regulations will be observed. Code of Federal Regulations, Title 35, § 4.164.

International rivers also may be the scene of naval operations. American, French and Belgian flotillas have been operated on the Rhine during the two World Wars, primarily for the performance of occupation duties after the cessation of active hostilities.[4] Soviet Russia maintained a flotilla on the Danube for the purpose of attacking the enemy behind the lines and for attack on enemy shipping.[5] If straits and canals are to be closed to enemy warships, there is even less reason to suppose that rivers should be held open for passage by enemy vessels.

As is the case with regard to the law concerning captures and prize on the high seas, it is necessary to make a distinction between enemy merchant vessels and neutral merchant vessels carrying contraband of war, on the one hand, and other neutral vessels, on the other, when questions arise concerning the passage of merchantmen through international waterways while the littoral State is at war. The former two categories are of inconsequential importance, since belligerent States will have no reason to risk the capture of their merchant vessels or cargoes needed by them in or within the vicinity of an international waterway controlled by the enemy. These first two types of shipping normally cause difficulties only when they are in the waterway at the time of the outbreak of war, but a related problem is posed by the matter of inspecting neutral ships to ascertain whether they do indeed carry contraband. Precedents regarding the passage of vessels of commerce through straits in such circumstances have been so extremely sparse as not to have established any clear rule of law.[1] Under the Montreux Convention, the Turkish Straits are, when Turkey is at war, to remain open to merchant vessels 'not belonging to a country at war with Turkey' on the condition that they do not in any way assist the enemy.[2] If a neutral ship carrying contraband were to present itself for passage through the Straits, it would seem that it would be assisting the enemy and might therefore be denied passage. The ship, having thus no rights under the Convention, might then be subject to seizure by Turkey. The disappearance of neutral shipping in recent wars and the laying of mine-fields would indicate that the question of assuring free passage to merchant vessels may have lost some of its importance, except in the case of limited wars. If the *Corfu Channel* case can be read as applying to warships in time of war, it may be argued that neutral merchant vessels should have no lesser rights than neutral warships to pass through international straits, but, as hitherto observed, there may well be difficulty in fitting the law of the *Corfu* case to the facts of any major war.[3]

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[1] Morison, *The Battle of the Atlantic, September 1942 to May 1943*, vol. i in *History of United States Naval Operations in World War II* (1948), pp. 148–54.

[2] *The Treaty of Versailles and After: Annotations of the Text of the Treaty* (Department of State Publication 2724, 1947), p. 690.

[3] Siegfried, 'Les Canaux internationaux et les grandes routes maritimes mondiales', in *Recueil des cours, Académie de droit international de la Haye*, 74 (1949), p. 5, at pp. 36, 60.

[4] Le Hagre, 'Les Formations maritimes françaises du Rhin', in *Revue de la navigation du Rhin*, 18 (1946), p. 181; *Revue de la navigation intérieure et rhénane*, 26 (1954), p. 334.

[5] See *Information Bulletin* of the Embassy of the U.S.S.R., Washington, D.C., 5 (1945), p. 4.

The exercise of the right of visit and search in the Suez Canal occasioned considerable difficulty and gave rise to a substantial amount of litigation. It will be recalled that Article IV of the Convention of Constantinople of 1888[4] requires that 'no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal', its ports, and within a radius of three marine miles from such ports. At the outbreak of the First World War, a number of enemy merchant ships were in the Canal or entered it in ignorance of the outbreak of war or purposely entered the neutral area of the Canal in search of refuge. Some of these were seized because they had already commited, or were about to commit, hostile acts. Orders were issued that those which sought to make the Canal and its ports places of refuge were to be escorted outside the Canal and the three-mile zone surrounding its ports.[5] The enemy vessels were conducted to British ships waiting outside the three-mile limit, which then seized the vessels as prize. When the claimants contended that these actions were inconsistent with Article IV of the Convention of 1888, the Privy Council held that the Convention had no application to ships using the Canal not for passage but 'as a neutral port in which to seclude themselves for an indefinite time, in order to defeat belligerents' right of capture'.[1] In the early stage of the war, all inspections of ships were carried out outside the waters of the Canal and its ports, but this process soon proved to be both troublesome and the cause of allowing some vessels to slip through. The solution was the conduct of the inspection within the three-mile limit for the ostensible purpose of ascertaining whether the vessels were engaged in any undertaking likely to affect the free navigation and safety of the Canal. If contraband or enemy cargo was found on board, the ship would be allowed to pass through the Canal and would not be captured until it had passed outside the three-mile zone.[2] During the Second World War, a like practice was followed. Inspection services were set up at Port Said and Suez, but no ships were detained until they had left the waters of the Canal.[3] In this fashion the requirements of Article IV were met. Despite the fact that the régime of the Panama Canal bears a close similarity to that of the Suez Canal, the United States actually seized six German ships which were in Canal Zone waters upon its entry into the First World War.[4] However, two Dutch merchant ships which were 're-quisitioned' in the Canal were released on the ground that the treaty obligations of the United States prohibited the exercise of belligerent authority within the Canal Zone.[5] In June 1941, the Italian liner *Conte Biancamano* was taken into the possession of the United States on the ground that there was evidence of a plan to sabotage the vessel and that the safety of the vessel was thereby endangered.[6] In both World Wars, the restrictions which had been placed on merchant shipping during the time the United States was neutral were maintained in force and supplemented when that country became a belligerent.[7] The waters surrounding the Canal were declared restricted even before the United States became a belligerent late in 1941, and ships were forbidden to enter them without instructions.[1] During the Korean conflict, no enemy merchant vessels passed through the Canal, and no vessels or contraband cargo was seized by the Canal authorities.[2]

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[1] Brüel, *International Straits* (1947), vol. i, pp. 108–9.

[2] Article 5, Montreux Convention, as cited *supra* in n. 5, p. 189.

[3] See p. 203, *supra*.

[4] As cited *supra* in n. 2, p. 191.

[5] British Notification relative to Enemy Ships in the Suez Canal, London, 23 October 1914, in *British and Foreign State Papers*, vol. 108 (1914), p. 154.

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[1] *The Pindos, The Helgoland, The Rostock*, [1916] 2 A.C. 193, at p. 196. See also *The Concadero*, [1916] 2 A.C. 199; *The Sudmark*, [1917] A.C. 620; *The Gutenfels* (1915), 1 B. & C.P.C. 102. In the last case, the Prize Court of Egypt spoke of the possibility that a German ship would request passage as an 'unlikely event', but stated that the British authorities would be required to let the ship pass through the Canal. In 1916 certain lighters and tugs belonging to a German company carrying on business along the Canal were, at the direction of the Procurator, held by the liquidator of the company at the disposal of the Crown. The Privy Council held that a valid seizure had been effected by this order and that there had been no exercise of any right of war in the Canal in violation of Article IV of the Suez Canal Convention. The 'de facto tranquillity' which the Convention envisages 'was fully respected', in the view of Lord Sumner: *His Majesty's Procurator in Egypt* v. *Deutsches Kohlen Depot Gesellschaft*, [1919] A.C. 291. The case is somewhat difficult to reconcile on theoretical grounds with the reluctance of the British authorities to perform any act which might call in question the neutral status of the Canal.

[2] Whittuck, *International Canals* (1918), pp. 82–84.

[3] Proclamation No. 4 on the Inspection of Ships at Port Said and at Suez, 3 September 1939, *J.O.*, 4 September 1939; Military Arrêté No. 1 re Declaration of Cargoes, 10 September 1939, *J.O.* 106, 28 September 1939; Arrêté No. 2 by the Military Governor, Canal Zone, re Port Said and Suez Ports, 14 September 1939, *J.O.* 102, 21 September 1939; see 'Conclusions du Gouvernement égyptien, etc.' (as cited *supra* in n. 2, p. 187), at p. 248.

[4] Padelford, *The Panama Canal in Peace and War* (1943), p. 144.

[5] *Foreign Relations of the United States*, 1918, Supplement I, pp. 1433, 1536.

[6] Padelford, op. cit., p. 177.

[7] Proclamation of 23 May 1917, *United States Statutes at Large*, vol. 40 (1917–19), pt. 2, p. 1667.

The strict interpretation which has frequently been placed on the prohibition of acts of war in the two major canals is hardly consistent with the fact that the neutral status of the waterways is no longer respected by either an attacking or defending belligerent. Vessels passing through the Suez Canal have in fact been searched to determine the character of the ships and their cargoes, and the postponement of seizure until the ship has passed three miles from port seems no more than an empty formality. No useful reason can now exist for prohibiting either a frank exercise of the right of visit and search in the canals or the actual seizure of vessels within the waters of the canals themselves.

The practices followed by States would seem to indicate that the recognition of any right of passage through international waterways for enemy warships when the littoral State is a belligerent would be altogether unthinkable. No more can it be expected that littoral States should deny themselves the opportunity of visiting, searching and seizing merchant ships passing through the waterway. The corresponding right of neutral warships and innocent merchant vessels to make use of the waterway must, under modern conditions, take second place to the legitimate need of the littoral State to defend itself and to derive strategic advantage from its control of the waterway. However, international law must require that the authority of the littoral State be exercised reasonably and with due regard to the degree of seriousness of the danger anticipated.

III. *Closing of international waterways as a sanction*

At the time that Italy was pursuing its war of aggression against Ethiopia, it was suggested that Italy's line of communications could be cut by closing the Suez Canal to the warships and merchant ships of that country as a sanction under Article 16 of the Covenant of the League of Nations.[3] The proposal was actually discussed with some seriousness in the House of

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[1] Letter from the Secretary of War to the President, 5 July 1941, submitting for his approval a regulation promulgated by the Acting Governor of the Canal Zone concerning 'Inspection and Control of Vessels in Canal Zone Waters', *Federal Register*, vol. 6 (1941), p. 3407.

[2] Letter to the writer, dated 14 December 1954, from Executive Secretary, Office of the Governor, Canal Zone Government.

[3] See generally Buell, 'The Suez Canal and League Sanctions', in *Geneva Special Studies*, vol. 6, No. 3 (1935); Guibal, *De l'influence du Pacte de la Société des Nations sur le statut international du Canal de Suez* (1937); Hoskins, 'The Suez Canal in Time of War', in *Foreign Affairs*, 14 (1935), p. 93, at p. 101; Serup, *L'Article 16 du Pacte et son interprétation dans le conflit italo-éthiopien* (1938), p. 159; 'The Suez Canal', in *Law Times*, 180 (1935), pp. 54–55.

Commons.[1] According to the position taken by the proponents of this measure, Article 20 of the Covenant, abrogating all obligations or understandings which might be inconsistent with the terms of that instrument, released Great Britain from any obligation to allow to an aggressor the right of free passage in time of peace and of war which was guaranteed by the Convention of Constantinople of 1888.[2] The opponents of the proposal pointed to the *Wimbledon* case as evidence of a general right of free passage and maintained that the institution of neutrality continued to exist.[3] The main impetus to the idea of closing the Canal to Italy appears to have come from Great Britain and the United States, while lawyers in France, Germany, and Italy generally took the position that the blocking of the Canal would be a violation of the Suez Canal Convention. It is not necessary here to decide the question, now academic, whether the Suez Canal Convention was indeed incompatible with the League of Nations Covenant.[4] From the point of view of practicability, the suggestion seems to have been without merit, unless the major Powers were prepared to deny the Canal to Italy and to defend it with their military, naval, and air forces. Sir Arnold Wilson, an eminent authority on the Suez Canal, remarked at the time that the closing of the Canal appeared to be 'of all possible sanctions the most complicated, the most dangerous, and, quite possibly, the most ineffective'.[5] The whole burden of giving effect to the decision would have fallen upon the British Government and upon the French administrators of the Canal.

There has been no revival of these proposals since the formation of the United Nations, although a similar association of ideas appears in the suggestion that arms shipments to Egypt should be cut off because of its actions with regard to the Suez Canal and because it refused to support the United Nations action in Korea.[6] In theory, the closing of the Canal could fall within the interruption of 'sea . . . and other means of communication' envisaged in Article 41 of the United Nations Charter. However, a requirement that a State through the territory of which an international waterway runs should give effect to the decisions of the Security Council by interrupting the offending State's use of the waterway would place an unwarranted and indeed unbearable burden upon the littoral State. An accident of geography would place the onus upon that State single-handedly to cut off the communications of a State which had committed a breach of the peace or an act of aggression. Until a more effective system of collective security is provided, those States through which waterways run can be expected to assume no less and no more responsibility for restoring peace and order than other States not so circumstanced. The denial of the use of international waterways must properly form a part of a more comprehensive scheme for giving effect to the decisions and recommendations of the principal organs of the United Nations.

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[1] *Official Report*, vol. 302 (1934–5), col. 1842; and see the remarks of Mr. Attlee in *Official Report*, vol. 302 (1934–5), cols. 2194–5.

[2] Buell, op. cit., pp. 11–13.

[3] Guibal, op. cit., pp. 68–84.

[4] A report by the Legal Sub-Committee on the Application of Sanctions and International Conventions Concerning Freedom of Communications to the Co-ordination Committee concluded that 'the League is entitled to hold that no individual member can release itself from the obligations which result from Article 16 of the Covenant by invoking obligations assumed towards a country not belonging to the League' when asked whether conventions concluded with States not Members of the League, which contain provisions on freedom of communications, prevent Members from taking such measures of interruption or control of passage as might be necessary for the application of Article 16. Annex to Proposal No. V adopted by the Co-ordination Committee on 19 October 1935, in Proposals and Resolutions of the Co-ordination Committee and the Committee of Eighteen, *League of Nations Official Journal*, Special Supp. No. 150 (1936), p. 12.

[5] *Official Report*, vol. 302 (1934–5), cols. 2202–3.

[6] Ibid., vol. 481 (1950–1), col. 1184.

IV. *Classification of vessels*

So long as customary or conventional international law makes any distinction between vessels of war and merchant ships as regards transit through international waterways in time of war, questions must inevitably arise concerning the category into which various types of vessels fall. In some cases, vessels have somewhat arbitrarily been placed in one group or another. Thus, prizes are often assimilated to warships.[1] But in other instances, the appropriate classification of vessels is not easily arrived at. Surprisingly, the administration of the Montreux Convention, which attempts the most precise definition of various types of vessels,[2] has occasioned greater difficulties in this respect than have other instruments, and accordingly illustrates some of the pitfalls to be avoided.

One of the methods of circumventing the Convention which was attempted by the belligerents during the Second World War was to transfer warships to a State not at war, which would accordingly have the right, denied to the belligerents, to send warships through the Turkish Straits. When reports were received in 1941 that Italy had sold destroyers to Bulgaria with this purpose in mind, Great Britain drew this information to the attention of the Turkish Government and pointed out that Bulgaria had been engaged in hostilities with Greece and Jugoslavia. Turkey denied having received any request for their passage.[3] Apparently the ships did

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[1] E.g., United States Presidential Proclamation No. 2350, 5 September 1939, *Federal Register*, vol. 4 (1939), p. 3821.

[2] Annex II to the Montreux Convention, *L.N.T.S.*, vol. 173, p. 215, repeats virtually without change (see p. 211, *infra*) the provisions of the London Naval Treaty of 25 March 1936, *L.N.T.S.*, vol. 184, p. 117.

[3] The matter was raised in the House of Commons on 8 October 1941: *Official Report*, vol. 374 (1940–1), col. 958. See *The Times* newspaper, 16 September 1941, p. 4, cols. 3 and 4; 19 September 1941, p. 4, col. 3; 20 September 1941, p. 4, col. 4.

Apparently this method of attempting to gain passage for belligerent warships had some precedent. It was reported that the British admiral in command of the squadron outside the Dardanelles in the First World War refused to allow a Turkish naval craft to enter the Mediterranean not pass through the Straits. A further device to get Axis warships through the Straits, a stratagem which proved to be somewhat more successful than transfers to third States, was to camouflage warships as merchant ships. In 1941 an Italian vessel, the *Tarvisio*, which appeared to be a commercial tanker, was permitted through the Straits. The fact that the vessel had appeared on the pre-war lists of the Italian Navy as an auxiliary vessel was communicated to Turkey, which thereupon forbade further passage by this and other former auxiliary vessels of Italy.[1] A number of small German craft suitable for military purposes apparently sailed through the Straits in 1942 and 1943 without challenge from the Turkish Government.[2] With the increase of Russian strength in the Black Sea in 1944, two classes of German warships attempted to make their way from that sea into the Aegean. Those in the 800-ton class had been used for troop transport while the smaller vessels, of some 40 to 50 tons' displacement, had been used for various purposes, including submarine-chasing. The German Navy had disarmed both types and camouflaged them as merchant vessels loaded with timber and other products. The passage of some of these craft through the Straits elicited a sharp British protest, which resulted in the resignation of the Foreign Minister and his replacement by Mr. Sarajoglu.[3] The new Foreign Minister thereafter followed a policy of giving strict inspection to all German ships desiring to pass through the Straits and of denying passage to vessels not bona fide merchantmen.[4] In the drafting of Annex II to the Montreux Convention, ships of under 100 tons' displacement had either designedly or through an oversight been omitted from the enumeration of 'vessels of war', and the Turkish Government was therefore acting in conformity with the Convention in permitting their passage.[5] It is also

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and compelled it to return to the Dardanelles because he had received instructions from his Government that he was to treat all Turkish ships having German officers or sailors aboard as German ships. *Foreign Relations of the United States*, 1914, Supplement, p. 113.

[1] See note from the Turkish Ministry of Foreign Affairs to the Soviet Embassy in London, 22 August 1946, in Howard, *The Problem of the Turkish Straits* (Department of State Publication 2752, Near Eastern Series 5, 1947), pp. 51–52, and *The Times* newspaper, 18 August 1941, p. 3, col. 4; 23 August 1941, p. 3, col. 5; 5 September 1941, p. 3, col. 3.

[2] In July 1941 Turkey permitted the passage of the motor-vessel *Seefalke* of 37 tons, flying the German commercial flag. The ship was unarmed and possessed none of the characteristics of warships laid down in Annex II to the Montreux Convention. The passage of this vessel and of a number of German fast pinnaces in 1942 and 1943 was protested against by the U.S.S.R. in 1946. See note from the Turkish Ministry of Foreign Affairs to the Soviet Embassy in Turkey, 22 August 1946, in Howard, op. cit., p. 51, and note from the Soviet Embassy in Turkey to the Turkish Ministry of Foreign Affairs, 24–25 September 1946, in Howard, op. cit., pp. 55–58; and *The Times* newspaper, 14 January 1944, p. 3, col. 4.

[3] See the remarks of Mr. Eden in the House of Commons in *Official Report*, vol. 400 (1943–4), cols. 1986–7; and *The Times* newspaper, 5 June 1944, p. 3, col. 5; 8 June 1944, p. 3, col. 4; 16 June 1944, p. 4, col. 5.

[4] *The Times* newspaper, 17 June 1944, p. 4, col. 5; 19 June 1944, p. 3, col. 5; see the answer of Mr. Eden to a question in the House of Commons on 21 June 1944 in *Official Report*, vol. 401 (1943–4), col. 167.

[5] Article 8, para. B (7) of the London Naval Treaty defined a seventh category of 'Small Craft'

arguable that auxiliary vessels like these in the 800-ton class do not fall within the prohibition of passage by 'vessels of war' because of the distinction made in the definitions of Annex II between 'vessels of war' and 'auxiliary vessels'.[1] In 1946 Russia made much of the alleged failure of Turkey to give proper application to the Montreux Convention as evidence of the need for giving Russia a share in the defence of the Bosphorus and Dardanelles.[2] Turkey would concede only that some precision of the Convention to take account of the new categories of warships which had been developed since 1936 would be desirable.[3] The dispatch of communications ships and minesweepers to the Yalta Conference, to which reference has already been made,[4] could be justified on the same legal basis as might be adduced for the passage of German auxiliary vessels or on the ground that Turkey was in 'imminent danger of war', which, under the terms of the Convention, allows Turkey to close the Straits to warships.[5] The fact that Turkey had severed its relations with Germany and was about to enter the war undoubtedly explains the position which it took.

Similar difficulties regarding merchant ships capable of being fitted out for naval use as warships or auxiliaries appear to have arisen with far less frequency in connexion with canals. It is reported that the *Derfflinger*, a German ship capable of being converted into an armed cruiser, was allowed through the Suez Canal during the First World War.[6] Precise definition of auxiliary vessels and their assimilation in general to warships, as in the regulations governing transit through the Panama Canal,[7] may have had a beneficial effect in precluding controversy in the case of that waterway.

The distinction which is made both in the practice of States and in international agreements between warships and their auxiliaries, on the one hand, and merchant vessels, on the other, is attributable to their differing function. Warships, fleet oilers, transports, communications ships, mine-

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under 100 tons. See note from the Turkish Ministry of Foreign Affairs to the Soviet Embassy in Turkey, 22 August 1946, in Howard, op. cit., at p. 52; Bilsel, 'International Law in Turkey', in *American Journal of International Law*, 38 (1944), p. 546, at p. 555, and 'The Turkish Straits in the Light of Recent Turkish-Soviet Russian Correspondence', ibid., 41 (1947), p. 727, at p. 739.

[1] Article 19 of the Convention speaks throughout of 'vessels of war' and of 'warships'. Article 8 states that, 'For the purposes of the present Convention, the definitions of vessels of war . . . shall be as set forth in Annex II to the present Convention'. Annex II defines various categories of 'vessels of war' and describes 'Auxiliary Vessels' as 'naval surface vessels' of over 100 tons 'which are normally employed on fleet duties or as troop transports, or in some other way than as fighting ships, and which are not specifically built as fighting ships'.

[2] The correspondence is collected in Howard, *The Problem of the Turkish Straits* (Department of State Publication 2572, Near Eastern Series 5, 1947), pp. 47 ff.

[3] Note from the Turkish Ministry of Foreign Affairs to the Soviet Embassy in Turkey, 22 August 1946, in Howard, op. cit., at p. 50.

[4] See p. 195, *supra*.

[5] Article 21.

[6] See *The Gutenfels, The Barenfels, The Derfflinger* (1916–17), 2 B. & C.P.C. 36, at 43–44.

[7] Presidential Proclamation of 13 November 1914, *United States Statutes at Large*, vol. 38 (1913–15), pt. 2, p. 2039, and Code of Federal Regulations, Title 35, §§ 4.161 ff., which refer throughout to the single category of 'a vessel of war or an auxiliary vessel of a belligerent'.

sweepers, landing craft, and the hosts of other vessels which participate in military and naval operations are essentially instruments of aggressive action, the presence of which in an international waterway might imperil the neutrality of a littoral State, either directly or through the possibility of attack by the enemy of the belligerent in question. While all merchant shipping possesses a special importance for the successful prosecution of war, it presents something less of a danger to a neutral State than warships or allied vessels. There is room for the view that the duties in which ships are engaged constitutes the criterion by which the determination is to be made whether the vessels are to be treated as if they were warships or as if they were merchantmen. Thus, merchant ships which are combat-loaded and in convoy because they are to participate in an amphibious landing should be treated as if they were warships, while merchant shipping travelling singly should not be so considered even if they might be carrying military supplies. If, however, as has been suggested above,[1] neutral States have been more cautious in permitting the passage of warships through straits used as channels of international communication than the necessities of the situation indicate, the distinction between vessels of war and merchant shipping may be an unnecessary one. When the littoral State is at war, enemy ships, whether warships or merchantmen, will be denied passage through the waterway, and the extent to which visit and search of neutral vessels will be conducted will probably be governed entirely by the law applicable to such vessels on the high seas. If neutral ships are not to be inspected and seized in an inter-oceanic canal, on the other hand, there is probably no reason for making any distinction within the waterway in the precautions taken by the littoral State to protect the waterway and its security. It would be proper to conclude that excessive emphasis may have been laid on the distinction between warships and merchant vessels, but that if different treatment is to continue to be accorded to them, warships and all types of auxiliary vessels should be defined in a broad sense as ships operating under public control for hostile or military purposes.[2]

V. *Conclusions*

The foregoing analysis of the passage of ships through international waterways in time of war has been based on the assumption that a comparative survey of the practice of States may indicate similar principles applicable to various types of waterways and, in those instances in which no similarity of factual situation or law can be found, the reasons for differing practice. For both political and legal purposes, analogies are frequently drawn between different types of international waterways. In 1945 President

[1] See p. 201, *supra*.

[2] As, for example, in United States Presidential Proclamation No. 2348, 5 September 1939, *Federal Register*, vol. 4 (1939), p. 3809, at p. 3811.

Truman linked three major types of waterways in stating that it was the policy of the United States that there should be 'free and unrestricted navigation' of the Danube, the Black Sea Straits, the Rhine, the Kiel Canal, and all the inland waterways of Europe.[1] As has been indicated in the foregoing paragraphs, differences of geography, to name only one circumstance, will not always make it possible to assure this freedom of navigation in the same form and under exactly the same conditions for straits, canals, and rivers. For legal purposes as well, precedents drawn from one waterway will often be applied to another waterway of the same or of a differing type. The Permanent Court of International Justice examined in detail the practices which had been followed in the passage of ships through the Suez and Panama Canals before passing judgment on the issue of a similar right as regards the Kiel Canal, and drew an important analogy between the passage of straits and canals.[2] The Treaty of Sèvres,[3] which was to regulate the status of the Turkish Straits, attempted to establish a régime for those straits which resembled that applying to the Suez Canal,[4] and international negotiations regarding the Suez Canal were often adduced as reasons for changing the régime of the Turkish Straits.[5] The undesirability of creating adverse precedents for other international waterways has also been a force in checking certain proposed courses of action.[6]

It is not the purpose of this study to examine in any detail the difficult question of the extent to which the instruments opening international waterways to free navigation by the ships of all nations confer legal rights on States not parties to these agreements. It seems highly questionable since the *Wimbledon* case that the right to free passage constitutes a servitude.[7] While the Permanent Court of International Justice had occasion in that case to consider only the issue whether Germany could forbid the passage of a merchant ship carrying arms on the basis that such passage would violate its neutrality, the reference by the Court to the permanent dedication of an international waterway to the use of the whole world[8] in connexion with its discussion of free passage gives some basis for concluding that this dedication confers rights upon all nations, whether or not parties to the particular dispositive agreement. In affirming the right of innocent passage of warships through the Corfu Channel, the International Court of Justice indicated that the decisive criterion on passage is the 'geographical situation [of the Strait] as connecting two parts of the high seas and the fact of its being used for international navigation'.[1] In so far as the free navigation of international waterways is guaranteed by agreement, such an agreement would seem to constitute a declaration of that nature which is intended to, and does, confer rights upon third parties.[2] It appears more probable, however, that the practice of States, as exemplified by international agreement and the course of conduct followed *ex opinione obligationis*, has established a rule of customary international law assuring, subject to the qualifications which have been indicated, the free passage of inter-oceanic waterways.

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[1] Radio address of 9 August 1945, *Department of State Bulletin*, vol. 13 (1945), pp. 208, 212. But cf. the Soviet view on this question in Serezhin, 'The World's Sea Routes and International Relations', in *New Times*, 9 January 1947, p. 28; see also the dissenting Opinion of Judge Krylov in *The Corfu Channel* case, Judgment of 9 April 1949: *I.C.J. Reports*, 1949, pp. 74–75.

[2] *The S.S. Wimbledon*, Publications of the P.C.I.J., Series A, No. 1.

[3] Article 37, Treaty of Peace with Turkey, signed at Sèvres, 10 August 1920, Treaty Series, No. 11 (1920), Cmd. 964.

[4] Tchirkovitch, 'La Question de la révision de la Convention de Montreux concernant le régime des Détroits Turcs, Bosphore et Dardanelles', in *Revue générale de droit international public*, 56 (1952), p. 189; Hoskins, *The Middle East: Problem Area in World Politics* (1954), p. 26.

[5] Hoskins, op. cit., p. 24.

[6] One of the reasons for not acceding to an Egyptian request for arms and a military mission, which were sought of the United States in 1947, has been said to be the inadvisability of creating a precedent for Panama with respect to the Panama Canal. See Hoskins, op. cit., p. 67.

[7] At p. 24; cf. Reid, *International Servitudes in Law and Practice* (1932), pp. 132–45.

[8] At p. 28.

Analysis of the practice of States and of the merits of the question leads to the conclusion that neutral littoral States are under an obligation to keep both international canals and straits open to the vessels of even the belligerents in time of war. The success of the proprietors of international canals in keeping these waterways open to belligerent warships in these circumstances suggests that States have paid undue deference to supposed requirements of security in closing international straits to warships of the belligerents while assuring free navigation for merchant vessels. However, it is clear that in the case of either type of waterway, the neutral State may impose reasonable restrictions designed to protect neutral vessels, to safeguard its own security and neutrality, and to facilitate the passage of ships. The permissible extent of these regulations must vary with the nature of the situation. It is a correlative of this principle that no hostile acts may be committed in the waterway and that it must in all respects remain neutral. If the tendency of States may seem to have been in the direction of taking too extreme measures for their security when they are neutral, the opposite course has been seen to have been taken in connexion with transit when the littoral State is at war. Although the obligation to keep the waterway open to neutral vessels continues, this consideration must yield to the legitimate needs of the belligerent through whose jurisdiction the strait or canal flows. The prohibition of acts of war within the waterway seems unrealistic and archaic in view of the defensive and offensive measures taken with regard to these waterways, and a frank recognition of the right to seize vessels in the waterway would be desirable. At the same time, having regard to the requirements of security, the restrictions imposed on peaceful passage through the waterway must be reasonable in nature and have as their principal purpose the maintenance of free passage through the waterway. So little practice has arisen with regard to international rivers that it would not be proper to draw an analogy between their standing and that of straits and canals in time of war. Keeping them open to free navigation will require consideration of a number of factors which have no application to inter-oceanic waterways.

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[1] *The Corfu Channel* case, Judgment of 9 April 1949: *I.C.J. Reports*, 1949, p. 4, at p. 28.

[2] See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 787; cf. Roxburgh, *International Conventions and Third States* (1917), pp. 61, 64, 111–12.

The gradual development of legal principles having general application to straits and canals in time of war bears testimony to the ability of customary law to reconcile conflicting interests on a pragmatic basis, even to the extent of prevailing over conventional international law.

THE TIME ELEMENT IN THE CONFLICT OF LAWS

By F. A. MANN

I

ALTHOUGH the conflict rule is primarily concerned with the factor of space, namely, the localization of legal relationships, time is frequently an important component. In fact, continental scholars have devoted much —perhaps too much—attention to the time element in the structure of the conflict rule. It is a subject which finds a place in all continental textbooks, and several monographs have been written about it.[1] In many judicial decisions its influence has had to be considered. The problem exists, of course, also in Anglo-American countries, where judges have dealt with it in a characteristically empirical fashion. To treat it on a comparative basis is a fascinating task. It involves not only the principles of statutory interpretation and the precise definition of the conflict rule, but to a large extent it also centres on fundamental conceptions which have left their mark on many branches of the law and are common to the whole of the Western world. It is the idea of the protection of vested rights that dominates the discussion of the time element in the conflict rule. Private international law has adopted it from municipal law which, in all legal systems, has developed it in numerous directions over a long period and in surprisingly similar terms. In the appropriate connexions, therefore, it will be necessary to recall the general background of the particular problems arising in the Conflict of Laws.

There are four such problems. Time becomes a significant factor if there occurs a change either in the content of the conflict rule of the forum (see section II) or in the identity of the connecting factor (see section III) or in the content of the substantive law of the country to which, through its connecting factor, the conflict rule of the forum refers (see section IV). If, in the last-mentioned case, the change involves retroactivity, it becomes necessary to ascertain the limits within which English law will recognize such effects (see section V). A further complication arising from changes of sovereignty is outside the scope of this article. Many of the typical problems to be considered may be exemplified by such a provision as that in s. 8 (1) of the Legitimacy Act, 1926, which reads as follows:

'Where the parents of an illegitimate person marry or have married one another whether before or after the commencement of this Act, and the father of the illegitimate child was or is, at the time of the marriage, domiciled in a country other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognised as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law.'

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[1] See, in particular, Affolter, *Das Intertemporale Recht* (1902–3); Roubier, *Les Conflits des lois dans le temps* (1929–33). For an exhaustive list of literature see Niederer, *Einführung in die allgemeinen Lehren des Internationalen Privatrechts* (Zürich, 1954), pp. 399–400.

II

This provision changed one of the rules of the English Conflict of Laws. It did so 'as from the commencement of this Act or from the date of the marriage, whichever last happens'. The 1st January 1927, therefore, was the earliest date as from which the new rule could take effect.

In this case the new conflict rule imported its own transitional law, so that what the French call the *conflit transitoire* could not at any time give rise to difficulty. It may be, however, that the legislator omits to deal with the transitional law, as he did, for example, when he incorporated into English law the provision of the Bretton Woods Agreement[1] according to which certain exchange contracts are unenforceable here if they are contrary to the exchange control regulations of a member State. In such circumstances the judge will have to decide whether the new conflict rule applies to facts or relationships which, at the date of the change in the conflict rule, are already in existence.

This is no more than a specific aspect of a well-known problem of statutory interpretation, namely, the extent to which there is support for the postulate of the non-retroactivity of legislation. At least since the days of Cicero there existed in Rome a pronounced reluctance to attribute retrospective effect to legislation.[2] This was not a legal rule, but a maxim based on the idea of *fides*, which the law-giver was expected to uphold and from which retrospective legislation was thought to depart.[3] It was in Justinian's time that birth was given to a formula which was to rule future centuries and which has not yet been improved upon: 'leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari, nisi nominatim et de praeterito tempore et adhuc pendentibus negotiis cautum sit.'[4] This principle was, in effect, accepted by Lord Coke,[5] and when one comes to the great codifications of the eighteenth and nineteenth centuries one finds the legislators echoing the distinction between *facta praeterita*, *pendentia negotia*, and *futura negotia*. Thus the Austrian Civil Code provides, in s. 5: 'Statutes have no retrospective effect; they have therefore no influence upon preceding transactions and upon previously acquired rights.' According to Article 2 of the French Civil Code, 'la loi ne dispose que pour l'avenir'. The Fourteenth Amendment of the American Constitution limits the effects of retrospective legislation by providing: 'nor shall any State deprive any person of life, liberty or property without due process of law'.[1] The authors of the German Civil Code refrained from introducing a similar clause of a general character, but their discussion of the principle must even today be described as remarkable.[2] In particular, they drew attention to the two meanings of the concept of retroactivity, a distinction which has also been formulated in this country.[3] In a wide sense, a statute is retrospective if, as from the date of its coming into force, it makes changes in the legal evaluation of facts which already are and continue to be in existence. In a narrow sense, a statute is retrospective if it changes the legal nature of facts or transactions in regard to the period prior to its coming into force. It is retroactivity in the latter sense, i.e. legislation directed against *facta praeterita*, which arouses suspicion in lawyers everywhere. No attempt at defining it more closely has as yet succeeded, and the same insufficient formulations have been developed in all countries. Thus in the municipal systems of this country,[4] the United States of America,[5] France[6] and Germany,[7] there is a strong presumption against the retrospective character of legislation, but such protection as the law affords is limited to 'vested rights' ('droits acquis', 'wohlerworbene Rechte'), though on occasions reference is also made to completed—as opposed to executory or inchoate—transactions or relationships, and procedural laws[1] are uniformly excluded from the ambit of the principle.[2]

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[1] The Bretton Woods Agreement Order, 1946: S.R. & O. 1946, No. 36.

[2] *In Verrem*, II. I. 42: *de jure civili si quis novi quid instituit, is omnia quae ante acta sunt rata esse patitur.*

[3] See Schulz, *Principles of Roman Law* (1936), p. 230.

[4] L. 7, C. I. 14. On the development of civilian thought on the subject see, for example, Savigny, *System des Römischen Rechts*, viii (1849), ss. 383–400, or Windscheid, *Lehrbuch des Pandektenrechts* (9th ed. by Kipp, 1906), pp. 130 ff.

[5] 2 *Inst.* 292.

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[1] It must be borne in mind that the provision in Article 1 of the Constitution against 'ex post facto law' is limited to the retrospective creation of criminal liability: see *Calder* v. *Bull* (1796), 3 Dallas 386. The field of criminal law is subject to special rules in all countries. What was said in *Phillips* v. *Eyre* (1870), 6 Q.B.C. 1, at p. 26, concerning the law of the United States must be read in the light of the developments during the last eighty years.

[2] See *Motive zum Bürgerlichen Gesetzbuch*, vol. i (1896), pp. 19 ff.

[3] See *Gardner & Co.* v. *Cone*, [1928] Ch. 955, at p. 966, *per* Maugham J. (as he then was).

[4] See Maxwell, *The Interpretation of Statutes* (10th ed., 1953), pp. 213 ff.

[5] See, e.g., *Coombes* v. *Getz* (1931), 285 U.S. 434, with reference to numerous earlier authorities. In that case it was held that the repeal of a provision entitling a company's creditors to recover certain moneys direct from the company's directors was unconstitutional in so far as it purported to have retrospective effect, since it interfered with vested rights. On the whole problem see Stimson in *Michigan Law Review*, 38 (1939), p. 30; *Corpus Juris Secundum*, vol. 82 (1953), §§ 412 ff., title 'Statutes'; and Sutherland, *Statutes and Statutory Construction* (3rd ed., 1943).

[6] For a detailed discussion see Planiol–Ripert–Boulanger, *Traité élémentaire de droit civil* (4th ed., 1948), vol. i, pp. 107 ff. Both the case law and the literature are enormous. The overriding principle of statutory interpretation has been established by a long line of decisions of the Cour de Cassation, particularly by the decision of the *Chambres Réunies* of 13 January 1932 (*D.P.*, 1932, I. 18): 'Si toute loi nouvelle régit, en principe, les situations établies et les rapports juridiques formés dès avant sa promulgation, il fait échec à ce principe par la règle de la non-rétroactivité des lois formulée par l'Art. 2 c. civ. lorsque l'application d'une loi nouvelle porterait atteinte à des droits acquis sous l'empire de la législation antérieure.'

[7] See, generally, Enneccerus–Nipperdey, *Allgemeiner Teil des Bürgerlichen Rechts* (14th ed., 1952), pp. 219 ff., and Meyer–Cording in *J.Z.*, 1952, p. 161 (with numerous references). For recent decisions of the Federal Tribunal on the guiding principles see the decisions of 10 July 1951 (*BGHZ.* 3, pp. 82, 84, 85) and 11 November 1953 (ibid. 10, pp. 391, 398). It has recently been suggested that in general a retrospective statute is contrary to the terms or the spirit of the Constitution: see, in particular, the remarkable decision of the Superior Administrative Court of Hamburg of 28 February 1952 (*J.Z.*, 1952, p. 416), which contains much historical material. Against this view see the decision of the Federal Constitutional Court of 24 April 1953 (*NJW.*, 1953, p. 1017, at p. 1019, with further references).

The same ideas, distinctions and formulations have made their appearance in the Conflict of Laws. Some continental writers have suggested that, in principle, the new conflict rule should be applied and thus be given retrospective effect,[3] except in so far as the protection of vested rights requires the application of the old conflict rule[4] or the facts under consideration were, at the time of their creation, entirely outside the ambit of the *lex fori*.[5] Others, taking the opposite view as a starting-point, would in principle apply the old conflict rule to facts and relationships created while it was in force, but would apply the new conflict rule if public policy requires it[6] or in so far as those effects of continuing relationships which arise after the introduction of the new law are concerned.[7] The majority of writers, however, advocate the application of the general rules of transitional law which the substantive law of the forum comprises.[8] This is the view which has prevailed in practice.[9]

It does not seem that English law can derive any benefit from these discussions or, indeed, that the English judge will have any difficulty about the method of solving the problem, however doubtful its actual solution may sometimes be. When he finds himself confronted with a question of statutory interpretation,[10] he will answer it by resorting to the familiar principles of English law, in particular those relating to the retrospective effects of legislation.[1] They are not peculiar to the Conflict of Laws, and therefore need not be enlarged upon in the present context. However, there does not appear to be any decision which had to apply those principles specifically to a new conflict rule. It can only be suggested that it is not easy to imagine circumstances in which an English court will hold that an English conflict rule is apt to confer a vested right of a substantive character, which requires and deserves protection against the implications of a new conflict rule. The primary function of the conflict rule is merely one of localization, i.e. of determining the *lex causae*. Suppose s. 8 of the Legitimacy Act, 1926, had not included the words quoted at the beginning of this section. It would have been difficult to argue that by English law the natural parents, domiciled in France, had a vested right in the continued illegitimacy of their child or that the child had a vested right in its illegitimacy.

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[1] See the United States case of *Chase Securities Corporation* v. *Donaldson* (1944), 325 U.S. 303, where it was held that a statute of limitation did not confer such fundamental rights within the meaning of the Fourteenth Amendment as to preclude a State from retrospectively lifting the bar. See also, as to France, Cass. Civ., 29 March 1897 (*D.*, 1897, I. 225) and, as to Germany, the decision of the Federal Tribunal of 23 September 1952 (*BGHZ.* 7, pp. 161, 167).

[2] The problem of statutory interpretation in general and the principle of non-retroactivity in particular justify and require detailed comparative study. The latter can be described as one of the great and truly general principles of law in all countries of the world. Its application to criminal law is everywhere a distinct matter and has been disregarded in the text.

[3] See Niedner, referred to by Melchior, *Grundlagen des Deutschen Internationalen Privatrechts* (1932), p. 65, n. 2; Baldoni in *Rivista di diritto internazionale*, 24 (1932), p. 3, at p. 184.

[4] See Niboyet, *Traité de droit international privé*, vol. ii, ss. 604 ff.; *Répertoire de droit international*, vol. iv, pp. 611 ff., s. 46.

[5] See Kahn, *Abhandlungen zum Internationalen Privatrecht* (1928), vol. i, p. 368.

[6] See, e.g., Arminjon, *Précis de droit international privé* (1947), pp. 301–5.

[7] Niederer, op. cit., p. 368.

[8] See Batiffol, *Traité élémentaire de droit international privé* (1949), p. 339 (with further references), and Melchior, op. cit., pp. 64 ff. (with further references).

[9] Cass. Req., 18 November 1912 (*S.*, 1914, I. 258); Cass. Civ., 14 April 1923 (*D.P.*, 1926, i. 248). As to Germany see the decisions cited by Melchior, op. cit., p. 65, n. 1.

[10] The problem could also arise when a judicial decision reverses previous judicial practice. However, the question whether, in such a case, an act done 'on the faith of a judicial decision' could be held to be exempt from the interpretation involved in the new decision is entirely unsettled: see *Bray* v. *Colenbrander*, [1953] A.C. 503, at p. 512 *per* Lord Normand.

A peculiar problem, which is unlikely to arise in this country, confronted the German courts after the introduction of the German Civil Code in 1900. The new law included changes in the rules of both German municipal law and German private international law, and also defined the extent to which the old rules of *municipal* law continued to apply to relationships created before 1900. Did this mean that, to the extent to which the old municipal law remained applicable, also the old rules of private international law continued to apply? In other words, did the inter-temporal law have precedence over the rules of private international law? The German courts, in accordance with the prevailing doctrine, answered this question in the affirmative.[2]

III

From the point of view of the time to which it refers, the connecting factor in the conflict rule may be constant or variable: it may be of such a nature that it necessarily refers to a particular moment and none other, so that further definition can be dispensed with, or it may refer to conditions which extend over a period of time so that a definition of the relevant moment is required.

The former group comprises connecting factors such as the *lex loci actus*, i.e. the law of the place where a contract is made, a marriage celebrated, a will executed, a tort committed; or the *lex loci solutionis*, i.e. the law of the place where a contractual duty is to be performed. In these cases it is not usually material to define the time contemplated by the rule: the definition is inherent in the rule itself. A tort is committed at a particular time; if, therefore, the conflict rule provides that the question of tortious liability is subject to the law of the place where the tort is committed, this is sufficiently precise, because the very commission of the tort fixes the time.[1] Similarly, a contract is subject to the law of a particular country which (except by such agreement between the parties as may be permitted by the proper law[2]) cannot be changed, so that again the connecting factor is constant.

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[1] See above, p. 219, n. 4.

[2] See, e.g., Melchior, op. cit., pp. 64, 65, with numerous references to the decisions; Frankenstein, *Internationales Privatrecht*, vol. i (1926), pp. 241 ff.; Wolff, *Deutsches Internationales Privatrecht* (3rd ed., 1954), pp. 2, 3.

The other group of conflict rules employs connecting factors of a different character. When the conflict rule enjoins the application of the law of the domicil, the law of the nationality, the law of the flag, or the *lex situs*, it employs conceptions which, over a period of time, may change. In these cases it is essential for the conflict rule to define the relevant moment of time. This is in fact done by s. 8 (1) of the Legitimacy Act, 1926, by providing that the father's *lex domicilii* 'at the time of the marriage' decides whether as a result of the marriage the illegitimate person has become legitimated. The *lex fori* has thus solved what, since Bartin,[3] the French describe as the *conflit mobile*.

Where the conflict rule rests on a statutory basis it will primarily be a matter of statutory interpretation to decide upon the time which it treats as material or, in other words, upon the question which legal system prevails in case the point of contact changes from one country to another. Thus, when the Wills Act, 1861, allows British subjects to avail themselves of certain testamentary forms, it is a matter of statutory interpretation whether the Act requires the testator to be a British subject at the date of the will or at the date of death; it is generally said that it is both necessary and sufficient for the testator to possess British nationality at the date of the will,[4] but the point has never been conclusively decided in this country.[5] Where, as normally happens in this country, it is left to the judge to develop the conflict rule, the problem arises whether any principle can or ought to be devised by virtue of which he can ascertain the connecting factor material in point of time.

Again, it would seem that an English judge is unlikely to derive substantial benefit from a purely dogmatic approach. Thus no safe guidance can be obtained from the theory of vested rights, which its adherents invoke to solve the present problem[1] and which, curiously enough, in this country has been relied upon by some of its severest critics[2] to solve the present problem. As a fundamental rule of decision that theory is distinctly out of favour everywhere. As has often been pointed out, it is of little practical help because it begs the question. If a testator, while domiciled in Holland, makes a valid will there and then dies domiciled in France where the will is invalid, an English judge (if he were not precluded by authority from doing so) could not hold the will valid on the ground that the testator had a vested right in its validity. Such a decision would assume rather than explain that which is to be decided: it would assume that Dutch or French law was capable of creating such a vested right and that, therefore, the conflict problem could be solved by its formulation. In Savigny's unsurpassed and unsurpassable formulation, the principle of vested rights 'leads into a complete circle; for we can only know what are vested rights if we know beforehand by what local law we are to decide as to their complete acquisition'.[3]

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[1] A tort may, of course, be committed at different times at different places. Thus a defendant may successively pass off my goods in France, Belgium, and Holland. In effect the defendant in such a case commits several torts, to each of which the remarks in the text apply.

[2] See Wolff, *Private International Law* (2nd ed., 1950), p. 426, who, however, rejects the validity of such an agreement if retrospective effects are intended. It must be doubted whether this is a valid qualification. If retrospective effect is permitted by the originally chosen legal system there is no reason for English law to disallow the substitution.

[3] *Principes de droit international privé*, vol. i, p. 28.

[4] Theobald, *On Wills* (11th ed. by Morris, 1954), pp. 4–5; Wolff, op. cit., p. 584; Graveson, *The Conflict of Laws* (2nd ed., 1952), pp. 242–3; and others.

[5] The decisions which are usually cited do not appear, on analysis, to be strictly relevant to the issue.

While, from the point of view of English law, it would be similarly unprofitable to consider the implications, for present purposes, of other general theories of private international law (such as the American 'local law' theory), a more specific doctrine to which many adhere must not be overlooked.[4] It has been said that, by reason of the *unité nécessaire de la législation*, the transitional law of the forum serves to solve also the problem of the *conflit mobile* and that therefore the law designated by the new connecting factor applies. The theory is based on analogy: the result should be the same, whether the legal system applicable to a given case has changed by the direct command of the legislator of the forum or, for example, by a change of the domicil. Thus the personal relations between husband and wife are subject to the husband's personal law as it may exist from time to time. In the words of Batiffol:[5]

> 'La solution se fonde sur les mêmes raisons qui commandent en droit interne l'application d'une loi nouvelle aux effets de mariages contractés avant sa promulgation: le mariage est un statut légal qu'il appartient au législateur de modifier à son gré. . . . De même, si le changement de la loi applicable procède, non d'une modification législative, mais du jeu de la règle qui attache le statut personnel à la nationalité, il n'y a aucune raison, au cas où cette nationalité change, de permettre aux époux de dénier à leur nouvelle loi personnelle le droit de régir les effets de leur mariage.'

This theory, it is believed, is far too comprehensive and inflexible and does not sufficiently take account of the character and purpose of each conflict rule.

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[1] In particular, Pillet, *Traité pratique de droit international privé* (1923), and his school. To the contrary, see Batiffol, op. cit., pp. 341–2, and numerous other writers.

[2] See above, p. 220, n. 4, and below, p. 225, n. 4.

[3] *A Treatise on the Conflict of Laws* (transl. by Guthrie, 1869), pp. 102–3.

[4] See, in particular, Batiffol, op. cit., p. 343, following Roubier's suggestions.

[5] Op. cit., p. 467. For other examples see ibid., pp. 411, 436, 475, 498, 509, 668, 669.

The problem cannot be solved dogmatically.[1] Its solution lies in the interpretation of each conflict rule and in the appreciation of its *ratio*. To use the language of Lord Reid in a different context,[2] 'the balance of justice and convenience' would appear to be the only test that is in harmony with the spirit of English law and that, in a number of cases, has led the common law to practicable results. That a title to movables acquired by virtue of the law of the country in which they were situate at the time of such acquisition is valid;[3] that the loss of title to movables according to the law of the country where at the time of the loss they were situate is recognized in England;[4] that a divorce pronounced or recognized by the husband's *lex domicilii* at the time of the commencement of the suit is effective, notwithstanding any rule of the country in which the spouses were originally domiciled;[5] that succession to movables is, in principle, governed by the law of the country in which the *de cujus* was domiciled at the time of his death, the *lex domicilii* to which he may have been subject at any earlier time being irrelevant[6]—all these are results which do not differ fundamentally from those reached elsewhere, but which English law has reached empirically, on the basis of an appreciation of the nature of things, justice, and convenience.

The only principle which may be derived from such considerations is that the legal significance of facts or relationships which occur under the control of a legal system applicable to them at the time of their occurrence cannot be assessed otherwise than in the light of that legal system. Or, to put the same point negatively, a legal system ought not to govern such facts or relationships as occur at a time when, under the conflict rule of the forum, they were subject to another legal system. This method of approach will, it is submitted, afford a measure of guidance and lead to satisfactory results where the effects of a change of the connecting factor still await clarification. There are in the main five such cases which will have to be reviewed shortly, not in order to discuss them exhaustively, but to indicate the principal considerations on which decisions should be founded.

(1) In the first place there is the *quaestio famosissima*[7] what law should govern the rights of husband and wife to each other's property in the absence of a marriage settlement. We know, of course, that the law of the husband's domicil applies, but is it the domicil at the time of the marriage or the domicil from time to time?

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[1] Lewald, *Règles générales des conflits de lois* (1941), would agree with this statement, but after a long discussion of the problem and its difficulties (pp. 38–44, 94–99) he remains curiously inconclusive.

[2] In *Starkowski* v. *Attorney-General*, [1954] A.C. 155, at p. 172.

[3] See Dicey, *Conflict of Laws* (6th ed., 1949), p. 558.

[4] Ibid., pp. 565 ff.

[5] Ibid., p. 368.

[6] Ibid., p. 817.

[7] See Wolff, op. cit., p. 360.

The choice lies between three possibilities, each of which has been followed in practice. Continental legal systems almost invariably refer to the law of the husband at the time of the marriage, and thus adopt what has been called the system of immutability.[1] English law is not settled, the old and unsatisfactory case of *Lashley* v. *Hog*[2] being inconclusive and, probably, distinguishable.[3] The leading textbooks favour the doctrine of mutability, i.e. the application of the law of the country in which the husband may from time to time be domiciled, 'except in so far as vested rights have been acquired under the law of the former domicile'.[4] In the United States, rights to movables are subject to the law of the country in which the husband is domiciled at the time of their acquisition; consequently, only movables acquired after a change of domicil are governed by the law of the new domicil.[5] None of these solutions is entirely satisfactory.[6]

Immutability is bound to lead to grave difficulties if the parties live in a country within whose legal system the matrimonial régime as originally created cannot readily operate: if French spouses live in England and are subject to the French *communauté des biens* in all its implications, both the spouses and their creditors will find it difficult to adapt the French law, which continues to govern, to the requirements of English law and practice. Moreover, if succession is governed by the law of the domicil at the date of death it is, as Rabel has pointed out, logically inconsistent and practically unsatisfactory to allow the matrimonial régime to be subject to the law of the domicil at an earlier date.

Mutability in the English sense is equally unattractive. It provokes the 'danger of confusion and unworkability in maintaining two heterogeneous systems at the same time'.[7] It also involves all the uncertainties of the conception of vested rights. One can understand that if husband and wife who are domiciled in Holland later acquire an English domicil, the *communauté des biens* comes to an end and each spouse's proprietary rights are accounted for in the course of winding-up. But it has been suggested that if the couple is originally domiciled in England, then acquires a Dutch domicil and thus becomes subject to the Dutch *communauté des biens*, 'husband and wife pool their property'.[8] Could it not be suggested that under English law each of the spouses has acquired a vested right to the separate enjoyment of his or her property, at any rate in so far as it exists at the moment of the change of domicil? Or suppose that a German couple who married in Germany without a marriage contract establish a domicil in England and that, under German law, the husband has during coverture the right to the income derived from the wife's property. Is this a continuing vested right not only in respect of income accrued while the couple was domiciled in Germany, but also in respect of property accruing in England?

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[1] This is frequently laid down by statute, e.g. in Germany and Switzerland. See, generally, Wolff, op. cit., and Frankenstein, *Internationales Privatrecht*, vol. iii (1934), pp. 302 ff.

[2] (1804), 4 Paton 581.

[3] See Cheshire, *Private International Law* (4th ed., 1952), p. 495; Westlake, *Private International Law* (7th ed. by Bentwich, 1925), p. 74; and Rabel, *Conflict of Laws* (1945), vol. i, p. 355.

[4] See Dicey (op. cit., p. 796) and Cheshire (op. cit., pp. 496 ff.), who regard 'the distinction between inchoate and vested rights' as decisive. See also Wolff, op. cit., § 339.

[5] *Restatement*, ss. 289–93; Beale, *Conflict of Laws*, pp. 1016, 1017; and Rabel, op. cit., p. 356.

[6] The reasons are discussed at length by Rabel, op. cit., vol. i, pp. 362 ff.

[7] Rabel, op. cit., p. 363.

[8] See Wolff, op. cit., p. 362.

Finally, the American solution is not free from complication. It necessitates the identification of the time when each particular piece of property was acquired. Yet, where it arises, this difficulty can normally be overcome by courts which are frequently called upon to follow property and make tracing orders. It is, therefore, outweighed by the fact that the American solution is free from the disadvantages which are involved in both immutability and mutability and to which allusion has already been made. While the American solution is not free from inconvenience, nevertheless it makes good sense. It is still capable of adoption by the law of England.

(2) There cannot be any doubt that English courts will pronounce a decree of divorce according to English law if, at the time of the institution of proceedings, the husband is domiciled here.[1] Thus, if Italians domiciled in Italy marry and live in Italy and the husband subsequently acquires a domicil in England, he can obtain a divorce in England on any of the grounds recognized by English law. The law of the new domicil is alone relevant. The idea that under Italian law the wife has a vested right to the indissolubility of the marriage has not even arisen in this country, though in France it required the famous decision of the Cour de Cassation in the first *Ferrari* case to eliminate it. However, there exists another problem of substance, and in order to examine it more closely it may be helpful to consider that decision in some detail.

Madame de Ferrari, a French national by birth, married in 1893 an Italian citizen who was domiciled in Italy. They agreed to separate in 1899. The wife returned to France, and re-acquired French nationality in 1913. She applied to the French courts for a decree converting the Italian separation into a decree of divorce in accordance with Article 310 of the French Civil Code. This application failed,[2] because since her re-naturalization the petitioner could only obtain a decree 'en se conformant aux règles édictées par la loi française' and Article 310 required a decree of separation which, *ex hypothesi*, had not been pronounced. The wife then brought a petition for divorce on the ground of *injures graves*, a ground of dissolution

[1] See Dicey, op. cit., p. 216.

[2] Cass. Civ., 6 July 1922 (*Clunet*, 1922, p. 714).

recognized by French law. The courts refused to dismiss this petition *in limine*, because, in the words of the Cour de Cassation:[1]

> '. . . contrairement à la prétention du pourvoi, l'arrêt attaqué n'a pas attribué abusivement un effet rétroactif au décret de réintégration en comprenant dans l'enquête des faits accomplis antérieurement à la date du-dit décret, c'est-à-dire à une époque où la dame Gensoul était placée sous l'empire de la loi italienne et, par conséquent, sous le régime de l'indissolubilité du mariage . . . la cause d'une action en divorce réside moins dans les faits allégués par le demandeur que dans l'atteinte profonde et permanente que ces faits ont portée au lien matrimonial en rendant la vie commune intolérable, atteinte qui ne peut être effacée que par la réconciliation.'

One can well understand the principle that a change of domicil may make new remedies available: a marriage which under the former *lex domicilii* was indissoluble, may be dissolved, and a matrimonial offence which under the former *lex domicilii* could lead only to a decree of separation, may become the foundation for a decree of divorce. If, to take an example given by Wolff,[2] a husband while domiciled in Belgium committed adultery outside the matrimonial home and if, under Belgian law, this is a matrimonial offence, though insufficient for a divorce, it seems reasonable to hold that, after the husband has acquired an English domicil, his wife can divorce him here. This, indeed, is a suggestion which would seem to be supported by the practice prevailing in the United States of America.[3] If, on the other hand, the facts which occurred under the control of the law of the former domicil did not constitute a matrimonial offence but were lawful, then, it is submitted, it would be unjust to treat them differently after the change of domicil. Suppose that under the former *lex domicilii* a husband could not complain about such behaviour of his wife as was attributable to illness or insanity; the acquisition of a domicil in England ought not to enable him to rely on the different interpretation which English law gives to the concept of cruelty,[1] and thus to obtain a divorce. The analogy of tortious liability should be followed. Just as an action for damages for tort does not lie unless the act complained of is unjustifiable by the *lex loci delicti commissi*,[2] so a divorce should not be founded on facts which were not wrongful according to the husband's personal law applicable at the time when they occurred.

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[1] Cass. Civ., 14 March 1928 (*Clunet*, 1928, p. 382). From a strictly logical point of view, French decisions are by no means consistent. See, for example, Cass. Civ., 28 June 1932 (*Revue de droit international privé*, 1932, p. 687), which concerned the rights of an illegitimate child—a problem discussed by Donnedieu de Vabres, *L'Évolution de la Jurisprudence française* (1938), pp. 381, 487; Batiffol, op. cit., § 478; and Rabel, op. cit., vol. i, pp. 622, 623. The plaintiff, originally of French nationality, who had become a British subject, brought proceedings for a declaration that the defendant was her natural father ('recherche de la paternité'). The defence was that English law applied, but did not justify the claim. It was held that while, from the date of the acquisition of British nationality onwards, the plaintiff's status and capacity were subject to English law, she 'demeure néanmoins recevable à exciper des droits acquis par lui en vertu de la loi française avant son changement de nationalité'. Or see Cass. Req., 11 November 1941 (*Nouvelle revue de droit international privé*, 1943, p. 97): while an Austrian national resident in France, the defendant was made subject to a *conseil judiciaire* on account of his prodigality. He went to the United States of America and was there naturalized in 1916. In 1930 he made a contract in France which, he said, was void on account of his prodigality. It was held that, 'la capacité légale des prodigues se rattachant à leur loi nationale, [the defendant] devenu citoyen américain ne pouvait exciper de la loi française'.

[2] Op. cit., pp. 375, 376. The learned author comes to the opposite conclusion: 'Should an immoral but legally immaterial act become a ground for divorce merely through a subsequent change of domicile? The answer is No.' He assumes that the act was 'legally immaterial'. The suggestion made in the text is that an act which was 'a matrimonial offence, though insufficient for a divorce' must be distinguished from an act which was lawful, or at least innocuous.

[3] See Rabel, op. cit., vol. i, pp. 451 ff.

(3) A third question concerns the determination of the time relevant for the purpose of ascertaining whether a person has the capacity to conclude a contract of a non-mercantile character.[3] This problem, though apparently never decided in Anglo-American countries, has led to much discussion. It cannot be solved otherwise than by distinguishing the four different cases that may arise and that may be explained by taking as an illustration the law of Switzerland, where a person aged twenty years is considered to be of age.[4]

First, a Swiss aged twenty, while domiciled in Switzerland, makes a gift. He subsequently acquires an English domicil. It is submitted that the gift is valid. It was made by a person who at the time of the gift was *sui juris* and who, in respect of that transaction, cannot be said to have become (retrospectively) incapable.

Second, a Swiss aged twenty is domiciled in Switzerland. He acquires an English domicil and, before his twenty-first birthday, makes a gift here. The gift is invalid. When it was made, the donor was incapable. When, by virtue of a Swiss domicil, he had become capable, he did not make the gift. It is therefore impossible to agree with the Austrian Supreme Court[5] which in two decisions had to pronounce upon a similar case. A woman of twenty-one, *sui juris* under her original personal law, acquired the nationality of Austria where at that time capacity was reached only at the age of twenty-four. She then accepted a bill of exchange. The Court held that the capacity, once attained, was a 'vested right' which could not be lost. If an Austrian aged twenty-two had become a subject of Germany, where capacity is attained at twenty-one, and had then made a contract, would the Court have held that there existed a 'vested right' in the continuation of the incapacity under Austrian law?

Third, an Englishman aged twenty, while domiciled in England, makes a gift here and later becomes domiciled in Switzerland. The gift is invalid.

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[1] See, e.g., *Squire* v. *Squire*, [1949] P. 51.

[2] See Dicey, op. cit., pp. 799, 800.

[3] For the purpose of this discussion it is being assumed that in the case of such contracts capacity is subject to the law of the domicil.

[4] Similar questions arise where the tests of insanity differ.

[5] Decisions of 9 August 1882 (*Clunet*, 1886, p. 468) and 29 November 1900 (Niemeyer's *Zeitschrift für Internationales Recht*, 11 (1901), p. 320). Against these decisions see Frankenstein, op. cit., vol. i, p. 138.

Fourth, an Englishman aged twenty acquires a Swiss domicil and then makes a gift in Switzerland. The gift is valid.

In short, the solution of the problem lies in the fact that capacity or incapacity does not exist *in vacuo*: on the contrary, it must be referred to the particular transaction under consideration and to the time of that transaction. It is not helpful, therefore, to ask whether, as a result of the change of domicil, the donor 'attains' capacity or 'keeps the majority [or capacity] he had attained under his former law'.[1] The change of domicil means that in respect of future transactions the donor will be subject to his new law, and ought not to cure a previously existing invalidity or invalidate a transaction that has previously been validly concluded. This conclusion is independent of the doctrine of vested rights or the question of whether status is a right or a source of rights or a faculty.[2] It is the justice and the adequacy of the result which support the solution.

It is a further and distinct problem whether and in what circumstances a contract concluded by an infant becomes capable of ratification as a result of a change of domicil. It is believed that in the third case posed above, the mere change of domicil by which the donor becomes *sui juris* does not involve such ratification as, under English law, is necessary to validate an infant's contract after he has reached the age of twenty-one. The gift is validated only if the donor, when he has come of age under Swiss law, ratifies the contract in the manner provided for by Swiss law, so that, presumably, ratification may occur before he is twenty-one.

(4) A fourth question concerns the determination of the time at which a testator must have capacity to make a will. Is it at the date of the will or at the date of death that he must have testamentary capacity? It may well be that the answer is supplied by s. 3 of Lord Kingsdown's Act which provides that

> '. . . no will or other testamentary instrument shall be held to be revoked or to have become invalid nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same.'

It is widely believed that s. 3 has no bearing on the question of testamentary capacity.[3] It is also widely held that s. 3 should be given a restricted meaning in several respects.[4] Yet it does not seem necessarily unreasonable to suggest that the true meaning of s. 3 is revealed by the following reformulation:

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[1] See Wolff, op. cit., p. 286; Rabel, op. cit., vol. i, pp. 147, 148.

[2] On the Continent the decision was frequently made dependent upon the answer to questions of this type. This, it is believed, is an inadmissible method of approach.

[3] In particular by Dicey (op. cit., p. 842) and Westlake (op. cit., p. 122); against this view see Wolff, op. cit., pp. 581, 582, 588, and Graveson, op. cit. (2nd ed.), p. 240.

[4] See Dicey, op. cit., pp. 839 ff., among others. One of the qualifications suggested by Dicey is that s. 3 should not be extended to material validity, because this 'is governed by the law of the testator's domicile at the date of his death and it is unlikely that the legislature intended to alter this rule in a statute dealing mainly with matters of form'. This is hardly convincing, because in that same statute dealing mainly with matters of form the legislature also dealt with construction.

> 'The validity, the construction and revocation of a will or other testamentary instrument shall be governed by the law of the country in which the testator was domiciled at the time when the will or instrument was made or revoked.'

So interpreted, s. 3 would contain a conflict rule which, like all conflict rules, would be applicable to British subjects as well as to aliens and which, from a legislative (as opposed to a dogmatic[1]) point of view, may well prove attractive.

However, if s. 3 does not deal with capacity, then, in the absence of conclusive authority, the above question must be answered in conformity with principle and good sense. The opinions of writers are sharply divided. On the one hand, it is urged that the conceptions of internal English law should be followed: since in English law a will is not invalidated by the testator's subsequent insanity and the will of an insane testator does not become valid by his subsequent restoration to mental health, the date of the will should prevail.[2] On the other hand, it is said that the rule according to which the validity of a will depends on the *lex ultimi domicilii* should extend to capacity.[3] From a practical point of view a decision in favour of the *lex ultimi domicilii* may perhaps be preferable, because it makes for the application of a single legal system and thus renders it unnecessary to submit the question of capacity and the question of intrinsic validity to different laws.[4] Although this is the view apparently taken in the United States of America[5] and in France,[6] it is submitted that, as in the case of transactions *inter vivos* (see section (3) above), testamentary capacity should be tested by the law of the domicil at the date of the will: if a domiciled German aged eighteen makes a will valid under German law and later dies domiciled in France where a minor cannot make a will, he should be held to have died testate; similarly, the will made by a domiciled German aged twenty-two is effective even if he dies domiciled in Mexico where persons below the age of twenty-five are without testamentory capacity. And if a domiciled Mexican makes a will at the age of eighteen, it should be held invalid in the event of his dying domiciled in Germany. Those who regard the date of the death as decisive would reach opposite results. It is clear, therefore, that, whichever solution of the problem is adopted, it will have to be accepted not only with diffidence, but also with a measure of indifference.

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[1] It may appear contrary to principle that material validity should be governed by the *lex domicilii* at the date of the will; yet this is the rule laid down by other legislators: see, for example, Article 24 of the Introductory Law to the German Civil Code (although this, of course, refers to nationality rather than domicil).

[2] See Dicey, op. cit., p. 819; Cheshire, op. cit., p. 520 (both with further references). This view is reminiscent of Roubier's theory: see above, p. 223, n. 4.

[3] See Westlake, op. cit., p. 122; Graveson, op. cit., p. 240 (although he thinks that 'reason . . . would clearly indicate' the opposite view), among others.

[4] If the formal and intrinsic validity of a will is, in principle, governed by the *lex ultimi domicilii*, there is nothing incongruous in suggesting the same solution for the question of capacity.

[5] See *Restatement*, s. 306, and Beale, op. cit., p. 1035.

[6] See Batiffol, op. cit., p. 668.

(5) It remains to consider the effect of a change of domicil upon the revocation of a will otherwise than by marriage, the assumption again being that the point is not determined by s. 3 of Lord Kingsdown's Act.[1]

If a will is revoked by the law of the testator's domicil at the time of the revocation, it should be immaterial that the act done under that law does not amount to revocation under the *lex ultimi domicilii*. The revocation constitutes a completed fact at the time when the new domicil is acquired, and there is in fact no testamentary instrument in existence on which the law of the new domicil could operate.

A more difficult case arises where an act is done while the testator is domiciled in a country by the law of which that act does not revoke the will, but under the *lex ultimi domicilii* that act amounts to revocation. It is submitted that the will is not revoked. At the time when the act was in fact done there was no revocation in law. At the time when the testator's act could have amounted to revocation in law it did not in fact occur. It does not seem right to evaluate the legal effects of an act from the standpoint of a system of law other than that applicable at the time when the act occurred.

These suggestions are in harmony with the views prevailing in England,[2] though they are opposed to the American *Restatement*[3] and American practice.[4] The leading case[5] arose out of the wholesome provision in the law of the State of Washington according to which divorce revokes a will. No such rule prevails in California. It was held in California that if the husband, while domiciled in Washington, obtains a divorce there, but dies domiciled in California, the will must be treated as valid. As Stumberg says,[6]

> '. . . since a testamentary disposition has no legal effect until the death of the testator, it seems logical enough to refer the matter of revocation of a will of personalty to [the law of the domicil at the time of death]. But the position might be taken with equal logic that if the will has been revoked under the law of the domicile at the time, this operates so as to take away from the document the potentiality of becoming a will and that therefore the effect of the event in this respect should be determined by reference to the law of the domicile at the time it takes place.'

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[1] This assumption would seem to be well justified for the reasons given by Dicey, op. cit., p. 841.

[2] See Cheshire, op. cit., pp. 542, 543; Dicey, op. cit., pp. 835, 836.

[3] *Restatement*, s. 307.

[4] Beale, op. cit., p. 1037.

[5] *Re Patterson* (1924), 64 Cal. App. 643, 222, P. 374.

[6] *Conflict of Laws* (1937), pp. 391, 392, 394.

IV

The English conflict rule is not called upon to make provision for the case in which a change occurs not in the content of the conflict rule itself nor in the identity or localization of the connecting factor, but in the substantive law of the country to which the English connecting factor refers. Thus, having given effect to legitimation by subsequent marriage as 'from the commencement of this Act or from the date of marriage, whichever last happens', and having established the law of the father's domicil 'at the time of the marriage' as the relevant legal system, s. 8 (1) of the Legitimacy Act, 1926, leaves it to that law to answer the question whether 'the illegitimate person became legitimated by virtue of such subsequent marriage'.

However, the substantive law of the *lex domicilii* may change: *legitimatio per subsequens matrimonium* may be introduced at a date later than that of the marriage, and this new law may or may not have retrospective effect, or, conversely, legitimation may have been possible at the date of the marriage, but may later be abolished with or without retrospective effect. That the English conflict rule refers to the country in which a person is domiciled at a given moment does not mean that it refers to such country's law as it existed at the same moment. Two entirely distinct matters are involved: both or either of them may be subject to change; the change of either of them does not attract a change of the other. It is the function of the conflict rule to localize a legal relationship and, for that purpose, to select one of several consecutive localizing factors, but once this function has been discharged the country so selected makes its legal system as existing from time to time, including its transitional provisions, available for application.

Ambiguous formulations frequently tend to obscure these distinctions. In the statement that succession is governed by the law of the deceased's domicil at the date of death, the words 'at the date of death' refer to domicil, not to law. The accurate, though somewhat cumbersome, formulation would be that succession is determined by the country in which the deceased was domiciled at the time of his death, and by those laws of such country which are applicable according to its own legal system. In short, the reference in the conflict rule to the *lex causae* includes a reference to the transitional law of the *lex causae*. If a German died in the year 1939 domiciled in Germany and left a will made in 1899, the English conflict rule allows German law, as being the testator's *lex domicilii* at the date of his death, to decide whether the will is valid. Under German law the validity of the will depends upon the law which was applicable when the will was made, i.e. at a time before the Civil Code came into force on 1 January 1900. The English judge would therefore have to apply the appropriate pre-1900 law. Similarly, if the will was made in 1935, and if the German law which was applicable at the date of death in 1939 and by which the will was invalid, should have been retrospectively abrogated in 1946, the English judge, sitting in the year 1954, ought to hold the will valid: it would be *nihil ad rem* to point out that under the English conflict rule the validity of the will is subject to the law of the country in which the testator was domiciled in 1939. The inquiry has passed the stage of localization. It is directed to the distinct matter of ascertaining the law applicable at the relevant place if that law (not that place) has changed. Having been referred to German law as the *lex causae*, the English judge should apply German law in its entirety,[1] including its transitional law.[2]

If, then, in principle, the transitional law of the *lex causae* should prevail in England and if its application is not excluded or even affected by the reference of the English conflict rule to a connecting factor as existing at a given moment, this submission must be tested in the light of the authorities. Unfortunately, not all of them are as unequivocal as the decision of the Court of Appeal in *Re Chesterman's Trusts*,[3] according to which a contract is subject to the proper law 'as it is from time to time'.

In *Lynch* v. *Paraguay Provisional Government*,[4] the testator had died on 1 March 1870 domiciled in Paraguay, where a decree made on 4 May 1870 confiscated his property and had the effect 'that by the now existing law of Paraguay no will [of the testator] is entitled to Probate or has any validity whatsoever in England or elsewhere'.[5] However, the will was admitted to probate in this country. Lord Penzance referred to the principle of English law that the validity of a will is determined by the testator's *lex domicilii* at the date of his death. He continued:[6]

> 'Does [English law] adopt the law as it stands at the time of death or does it undertake

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[1] Cf. the manner in which English law has dealt with the problem of renvoi: it refers to the law which the judge sitting in the foreign country would apply.

[2] This is the view prevailing on the Continent. As to France: apart from decisions to which reference will be made below, see Batiffol, op. cit., p. 356, and Arminjon, op. cit., p. 299, among others. As to Germany see, in particular, Melchior, op. cit., pp. 68 ff., with references to a number of decisions not all of which are in point. A clear case supporting the statement in the text is the decision of the Court of Appeal in Berlin of 10 December 1934 (*IPRspr.* 1934, 96) relating to facts of almost bizarre complication. For a different approach see Frankenstein, op. cit., vol. i, pp. 131 ff., who, proceeding from the necessity for the protection of vested rights, distinguishes between completed, inchoate and continuing facts; his exposition will be found illuminating. A different view is also expressed by Neumeyer, *Internationales Verwaltungsrecht*, vol. iv, p. 289, whom Lewald, op. cit., pp. 112–19, follows: 'The material question is what substantive law is in force in the foreign country at the date defined by the lex fori in regard to the set of facts defined by the lex fori.' As to Switzerland, see Niederer (cited above, p. 217, n. 1), p. 361.

[3] [1923] 2 Ch. 466, 478 *per* Lord Sterndale M.R.

[4] (1871), L.R. 2 P. & D. 268.

[5] At p. 268, where the pleading is set forth. It is not at all certain whether the law of Paraguay really had the effect of retrospectively invalidating the will. (See the argument of the Solicitor-General (Sir J. D. Coleridge, Q.C.) at p. 269.) If it had such effect, it would have been very similar to the famous Loi de Nivôse, which was enacted during the French Revolution and was responsible for a large part of the French attitude towards retrospective legislation: see Planiol–Ripert–Boulanger, op. cit., p. 121.

[6] At p. 271.

to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law?'

To answer the question in the latter sense appeared to Lord Penzance 'both inconvenient and unjust',[1] and he pronounced in favour of the will. His very question makes the confusion obvious. The English conflict of laws says nothing about whether or not it adopts the foreign law 'as it stands at the time of death'. It adopts the law of a foreign country and leaves it to the latter to decide how it stood at the time of death. One can sympathize with Lord Penzance's inclination to find in favour of the will.[2] While the result, if reached by a different route, merits approval, the principal reason given by Lord Penzance does not carry conviction.[3]

In *Re Aganoor's Trusts*,[4] the testatrix died on 17 November 1868 domiciled at Padua, where at that time the Austrian Civil Code applied. She left a will the simplified effect of which was that in respect of certain property in England she conferred limited interests on *A* and a reversionary interest on *B*. On 1 September 1871 the Italian Civil Code came into force. It provided for the dissolution of the trust and the division of the trust property between *A* and *B* in equal shares absolutely. The English trustees applied for directions as to who was entitled to the trust property. Romer J., following Lord Penzance, held that English law adopted the law of the domicil 'as it stood at the time of the testator's death'[5] and that, therefore, the Code of 1871 had to be disregarded. This case, as opposed to *Lynch*'s case, did not involve a retrospective change of the *lex successionis*. The real question which fell for decision was whether the beneficial interests in a trust fund held in England and subject to Italian law could be altered by the law of Italy. It is difficult to see why this question should not have been answered in the affirmative and, in particular, what it has in common with that which arose in *Lynch*'s case. Can it be doubted that if a settlement is made in New York under New York law and the funds are held in this country, English courts would give effect to New York legislation, enacted after the date of the settlement, under which in all settlements, whenever made, the perpetuity period is reduced from 21 to 18 years?[6] It is submitted, therefore, that both the reasoning adopted and the result reached by Romer J. in *Re Aganoor* should be disapproved.

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[1] At p. 272.

[2] The result ought to have been based on the ground mentioned below, p. 242. The Government of Paraguay was bound to fail in the end, because property situate in this country could not be confiscated.

[3] The reasoning is approved, however, by the American *Restatement*, s. 303 (*c*), and by Beale, as well as by Lewald (see *supra*, p. 233, n. 2). In truth, *Lynch*'s case is perhaps the most significant example of what Professor Kahn-Freund has aptly described as the 'premature crystallisation' of English public policy (*Transactions of the Grotius Society*, 39 (1954), pp. 39 ff., 45).

[4] (1895), 64 L.J. Ch. 521.

[5] At p. 523.

[6] A settlement made *inter vivos* is subject to its proper law: *Duke of Marlborough* v. *Attorney General*, [1945] Ch. 78. The same rule ought to apply to a settlement made by will.

On the other hand, there are two cases in which the transitional law of the *lex causae* was applied and with which, it is submitted, *Lynch*'s case cannot be reconciled. In both of them the connecting factor was fixed rather than variable, so that it necessarily implied the determination of the moment which, according to the English conflict rule, was relevant for the purpose of localization. In *Phillips* v. *Eyre*,[1] the plaintiff claimed damages in respect of assault and false imprisonment committed by the defendant Government of Jamaica in the course of suppressing a rebellion which had occurred in the island. The defence was that, as a result of legislation enacted in Jamaica after the date of the tort, the act complained of had retrospectively become lawful. Under the English conflict of laws[2] the question of the defendant's liability was primarily governed by the law of the place where the alleged tort was committed. The relevant time for the selection of the connecting factor, the *locus delicti commissi*, could, in the nature of things, only be the date of the alleged tort. If the Court had been under a duty to apply the law of Jamaica 'as it stood at the time of the' tort, the retrospective legislation would have been disregarded. However, the Court gave effect to it and applied, therefore, the transitional law of the *lex causae*. In doing so it did not feel hampered by the definition of the relevant time impliedly contained in the English conflict rule.[3]

In *Starkowski* v. *Attorney General*,[4] the question was whether a marriage celebrated at Croydon on 11 February 1950 was valid or whether it was void on the ground that the wife had been married in Austria before that date. She had gone through a form of marriage there on 19 May 1945. This was invalid at the time. While both the wife and her (first) husband were still resident in Austria, viz. on 30 June 1945, a law came into force providing for the retrospective validation of the marriage upon an entry being made by a Registrar. In 1946 the wife and her (first) husband took up residence in England and soon afterwards she became domiciled here. In 1947 the wife separated from her (first) husband. In 1949 the Austrian Registrar entered the marriage in the register, so that it became valid as from 1945. The House of Lords held that the Austrian ceremony was effective and that, consequently, the marriage celebrated at Croydon was bigamous. Again the English conflict rule employed a connecting factor which involved not only localization, but also fixed the relevant time: English law referred to the country in which the marriage was celebrated, i.e. Austria. The House of Lords did not apply Austrian law 'as it stood at the time of the' ceremony, but Austrian law including its transitional law. It is true that both Lord Tucker and Lord Cohen distinguished *Lynch*'s case but it is respectfully suggested that the distinction is illusory and that in essence, though not in terms, *Lynch*'s case was, or should be treated as having been, overruled. Lord Tucker adopted the distinction which had already been drawn by Barnard J. in the Court of first instance[1] and by Somervell L.J. in the Court of Appeal[2] and according to which *Lynch*'s case would have been in point only if the ceremony at Croydon had preceded the registration made in Austria in 1949.[3] But in either case the question whether the Croydon ceremony was valid is merely the starting-point of the inquiry. Its outcome depends on the question 'whether the ceremony of marriage celebrated in . . . 1945 was a valid form of marriage'.[4] This was the real issue, which, according to *Lynch*'s case, could only be decided in the light of the law as it stood at the time of the ceremony. As soon as one admits that in any conceivable circumstances Austrian law could retrospectively validate that ceremony, one applies Austrian transitional law and departs from the principle of Lord Penzance's decision. On the other hand, Lord Cohen thought[5] that the subject-matter of *Lynch*'s case was 'so remote' from the question before the House of Lords that Lord Penzance's observations were of no assistance. Yet the fundamental question was identical in both cases: does an English court apply the transitional law of the *lex causae*? It is submitted that with every justification the House of Lords gave an affirmative answer, which was inconsistent with the answer given by Lord Penzance.

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[1] (1870), 6 Q.B.C. 1.

[2] To a very large extent the judgment does not treat the question as one appertaining to the conflict of laws but applies English principles of law, because a British colony was concerned.

[3] *Lynch*'s case was not referred to. The Court took it for granted that it had to apply the indemnifying legislation of Jamaica, and was merely concerned with the question whether it had to be disregarded on the ground of its retroactivity.

[4] [1954] A.C. 155.

V

It follows from the preceding review of the most important authorities[6] on the subject that, in principle, English private international law has no objection to foreign retrospective legislation. It is obvious, however, that there must be limits to this rule. Retrospective legislation may lead to such extraordinary consequences that judges will, or ought to, seek to circumscribe its international impact. To define the exceptions is a matter of very grave difficulty. The problem is neither new nor peculiar to English law. Hence it is justified, and may prove helpful, to turn for guidance to the rich material available in France, where the courts have more frequently than elsewhere come across the problem, and whose jurisprudence merits closer study.

(1) French textbooks of acknowledged authority suggest that the retro-

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[1] [1952] 1 All E.R. 495.

[2] [1952] P. 302.

[3] [1954] A.C. 155, at p. 175.

[4] At p. 178, *per* Lord Cohen.

[5] At p. 180.

[6] Some other cases dealing with retroactivity were referred to in argument in *Starkowski*'s case, but they do not seem to be really in point.

activity of foreign legislation is not, as a rule, contrary to *ordre public* except, possibly, where it would lead to 'un résultat suffisamment injuste'.[1] In the practice of the courts there has never been any doubt that effect must be given to foreign legislation which merely changes the content or extent of present rights previously created; thus if Russian legislation shortens the duration of the copyright vested in an assignee of the author, it will be applied in France.[2] In other cases—all of which, curiously enough, arose out of Spanish events—there appear some significant qualifications.

The Cour de Cassation[3] had to decide the question whether the plaintiff was entitled to payment from his debtor, a Spanish company which in 1868 had come to an arrangement with its creditors other than the plaintiff, such arrangement having been validated by a Spanish Law of 1869. The Court pointed out that by 1869 the plaintiff 'n'avait entamé aucune poursuite contre la compagnie', that he had not 'acquis contre la compagnie défenderesse d'autres droits que ceux d'une obligation ordinaire' and that therefore ('ainsi') the contract could become valid 'sans blesser le principe de la non-rétroactivité des lois'. The *ratio decidendi* seems to have been that the contract was executory and had not been repudiated.

Many years later, the Cour de Cassation held[4] that if a plaintiff's goods are illegally confiscated in Spain and if after their arrival in France a Spanish Law purports to validate the confiscation, this is without effect in France, because

> 'le caractère rétroactif d'une telle disposition ne saurait, au regard de la législation française, produire effet *à l'encontre des droits acquis*, notamment en ce qui concerne les marchandises antérieurement débarquées sur le territoire français.'

By a French Law of 1927 a woman of foreign nationality acquired French nationality by marriage with a Frenchman if, under her own law, she necessarily followed her husband's nationality. A woman of Spanish nationality married a Frenchman in 1933 when under the then Spanish law the wife retained Spanish nationality in the absence of an option for French nationality. In 1939 the Nationalist Government of Spain retrospectively repealed this provision and restored an older Spanish Law according to which a wife shared her husband's nationality. In view of this provision the wife claimed French nationality. The Cour de Cassation[1] denied her claim because

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[1] Niboyet, *Traité de droit international privé*, vol. iii, s. 990. In the same sense see Batiffol, op. cit., p. 356; Maury (cited below, p. 238, n. 2), p. 61; and, similarly, Bartin, op. cit., pp. 296 ff., though he thinks that the principle of non-retroactivity as understood in France applies if the foreign law does not expressly purport to be retrospective.

[2] Trib. Civ. Seine, 20 December 1929 (*Clunet*, 1930, p. 681); similarly Cour d'Aix, 28 April 1910 (ibid., 1911, p. 199); Cour de Paris, 2 July 1954 (*Clunet*, 1955, p. 142). Cf. Cass. Civ., 26 July 1899 (*S.* 1900, I, 321); and see also Court of Appeal Genoa, 6 May 1939 (*Clunet*, 1932, p. 224), in which it was held that it is not contrary to Italian public policy to apply a foreign statute of limitation which is retrospective in the sense that it applies to contracts concluded before its date.

[3] Cass. Req., 18 January 1876 (*S.* 1876. I. 163).

[4] Cass. Civ., 14 March 1939 (*Clunet*, 1939, p. 615 (italics supplied)), and *Annual Digest*, 1938–40, Case No. 54.

> 'cette rétroactivité, édictée par le gouvernement espagnol, ayant une portée purement interne, ne pouvait avoir d'effets sur la combinaison, *antérieurement réalisée,* de la loi française avec la Constitution républicaine espagnole, seule alors applicable, ni en modifier les conséquences juridiques *définitivement acquises,* en exécution de la législation française.'

Another case which arose out of events in Spain and which, though decided by an inferior tribunal,[2] has led to much discussion, is worth noting. The plaintiff, a woman of Spanish nationality, was married to a Spaniard before a Registrar in Barcelona in 1938. Later the Government of Nationalist Spain, recognized by France in 1939, retrospectively declared marriages between Spaniards of the Catholic faith null and void if celebrated before a Registrar. The plaintiff's husband was killed in an accident in France. In order to claim damages the plaintiff asked for a declaration of the validity of her marriage. It was held that the marriage was invalid and that 'l'application rigoureuse du droit espagnol à des ressortissants espagnols ne semble en rien contraire à l'ordre public français.' It is remarkable that this decision, which is perhaps explained by its date, seems to have left French lawyers indifferent. To an English lawyer it does not seem consistent with the Cour de Cassation's careful formulations and their emphasis upon the respect for *droits acquis* and for *conséquences antérieurement réalisées et définitivement acquises.*[3]

(2) Formulations such as these recur in the English Conflict of Laws. In particular, they have recently come into prominence in connexion with the

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[1] Cass. Civ., 24 October 1949 (*Clunet*, 1950, p. 540 (italics supplied)); in the same sense Tribunal de Montpellier, 24 March 1941 (*Rev. Crit.* 1947, p. 288).

[2] Tribunal de Tulle, 6 January 1944 (*Rev. Crit.* 1947, p. 304), discussed by de Lapradelle, in *Nouvelle revue de droit international privé*, 1944, p. 94, and Maury, in *Festschrift für Leo Raape* (1948), pp. 53 ff. And see Mezger et Maury, *Matrimonios españoles ante tribunales francescos* (Madrid, 1949), reviewed by Valls in *International Law Quarterly*, 4 (1951), p. 143, and by Neumayer in *Rabel's Z.* 1952, p. 148.

[3] In countries outside France there is very little material on the recognition of foreign retrospective legislation. The issue arose, however, in connexion with German revalorization legislation, the retrospective effect of which was accepted as consistent with public policy by the Supreme Courts of Austria and Switzerland, but rejected on the ground of public policy by the Supreme Courts of Hungary and Holland and by the Court of Appeal of the Mixed Tribunal in Egypt on the ground of violation of vested rights: see Mann, *The Legal Aspect of Money* (2nd ed., 1953), p. 240, nn. 3, 4, and 5. As a result of further investigation it appears that the two decisions of the French Cour de Cassation there referred to did not reject that legislation on the ground of *ordre public*; the decision of 14 April 1934 rests on the fact that the plaintiff claimed an indemnity in respect of the revalorization of a German transfer tax and that a decision in his favour would have violated 'le principe en vertu duquel le caractère rétroactif d'une loi *fiscale* étrangère ne saurait être invoqué devant les tribunaux français à l'encontre des nationaux français'. The decision of 19 October 1938 rests on the finding of the lower courts that the parties had intended 'un paiement éteignant définitivement la dette' and that therefore the control of German law was exhausted.

retrospective effect of the recognition of foreign States or Governments. This leads to problems not essentially different from the case of a change in the substantive law of a foreign country, because recognition may involve the substitution of one body of foreign law for another. While the retrospective effect of such substitution by virtue of recognition is generally accepted, the limits of retroactivity remain to be defined.[1] In a leading case decided by the Supreme Court of the United States of America it was held that the recognition of a new Government could have no effect 'upon transactions *consummated* here between its predecessor and our own nationals'.[2] This familiar phrase was of some influence when the case of *Gdynia Ameryka Linie* v. *Bogusławski*[3] came before the English courts. The question was whether a contract made with the *de jure* Government of Poland established in London became invalid when *de jure* recognition was granted to the Government of National Unity established in Poland. It was argued that by virtue of the retroactivity of recognition, the contract made in London was invalid. The House of Lords rejected that argument, primarily on the ground that retroactivity of recognition had to be confined to matters which, before the recognition, had been under the control of the *de facto* Government, and could not, therefore, extend to matters which, before the withdrawal of *de jure* recognition from the old Government, had been under the latter Government's sole control.[4] Nevertheless, Lord Porter[5] used the more general formula that retroactivity of recognition 'does not affect transactions *carried through* under the old régime'. It is also noteworthy that in the Court of Appeal Cohen L.J.[6] (as he then was) refused to limit non-retroactivity to completed transactions in the strict sense: he did not think 'that a different principle applies where the contract is executory. In either case the other party to the transaction has acquired a vested right.'

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[1] It is interesting to note that Lauterpacht, *Recognition in International Law* (1947), p. 60, suggests that in connexion with recognition 'the principle of retroactivity is one of convenience'. Accordingly, the learned author states that 'there has been no hesitation to abandon that principle of convenience when it was opposed by more cogent considerations'. One such consideration arises where retroactivity 'would have meant to frustrate legitimate expectations of persons who relied, as they were entitled to do, on the fact that their government continued to recognize, for a time, the predecessor of the authority newly recognized'. This is a method of approach which, it will appear, is very similar to that suggested in the text.

[2] *Guaranty Trust Co.* v. *United States* (1938), 304 U.S. 140 (italics supplied).

[3] [1953] A.C. 11.

[4] Cf. Lord Simon in *Civil Air Transport Inc.* v. *Central Air Transport Corporation*, [1953] A.C. 70, at p. 93: 'Subsequent recognition *de jure* of a new government as the result of successful insurrection can, in certain cases, annul a sale by a previous government. If the previous government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a *de facto* new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government never regains the goods and the *de facto* government becomes recognised by Her Majesty's Government as the *de jure* government, purchasers from the old government will not be held in Her Majesty's Courts to have a good title after that recognition.'

[5] [1953] A.C. 11, at p. 30 (italics supplied).

[6] [1951] 1 K.B. 162, at p. 177.

It must indeed be obvious that the limits within which English law will allow foreign retrospective legislation to operate cannot be ascertained by asking whether or not a transaction is 'consummated' or 'carried through' or has brought a 'vested right' into existence. Notwithstanding their long history and their universal currency, such formulae are not a safe guide to judicial decision. The question whether a right is vested or a transaction is consummated cannot easily be answered. In truth these formulae conceal but do not solve the difficulty. They require further definition and explanation which at no time and in no country it has as yet been possible to provide. As has been said by an American writer:[1]

> '. . . any formula concerning the problem of retroactivity amounts to a petitio principii if the formula is based upon a distinction between vested and non-vested rights. Where Judges speak of vested rights they use the term for designating a result rather than the rationale upon which the result was reached.'

The difficulty is one with which lawyers are not infrequently confronted: it being impossible to particularize a comprehensive legal principle, it is in the last resort the trained lawyer's sense of the 'balance of justice and convenience'[2] that will answer the question whether a given case falls on the one or the other side of the line. Or, as a distinguished French scholar has put it, 'dans nombre de cas la solution juste est acquise par sentiment intuitif plus que par raisonnement'.[3] It is not the verbal or logical argument, but the feeling for what is right and what is wrong in the circumstances of the case and in the light of results that will decide whether or no foreign retrospective legislation should be given effect. Different minds will doubtless reach different conclusions. No scholar who discusses this branch of the law ought to be dogmatic.

While, therefore, English public policy must remain the indispensable, though ill-defined and undefinable, bar beyond which foreign retrospective legislation cannot assert itself, it is perhaps not altogether impossible to sketch some of the more specific considerations likely to bear upon the result.

In the first place they arise from the fact that in many cases retroactivity is liable to be a source of confusion. Retroactivity as such not being repugnant to English conceptions, the decisive question will frequently be whether the foreign legislation would or would not have shocked the conscience if it had been prospective rather than retrospective. This depends on its content, not on its retroactive effect.

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[1] Lenhoff, *Comments, Cases and Materials on Legislation*, p. 379.

[2] See above, p. 224, n. 2.

[3] Gény, *Méthodes d'interprétation et sources en droit positif*, vol. ii, s. 163, referred to by Planiol–Ripert–Boulanger, *Traité élémentaire de droit civil* (4th ed., 1948), p. 110.

Secondly, it must always be remembered that relation back is a fiction, the product of abstract logic. Hence it must yield to the requirements of factual practicability: *facta infecta non fieri possunt*. This is probably one of those principles which are general in character,[1] the infraction of which offends against a distinct standard of justice, which English law has accepted and which, therefore, it will not allow to be disregarded by foreign laws. The rules developed by the common law have never been comprehensively formulated,[2] but they strongly support the following suggestions. The fiction of relation back primarily operates when facts have come into existence which have led to a state of suspense or, in other words, to a relationship that is 'open and executory'[3] and when an act occurs which perfects that state of suspense *ab initio*.[4] However, if other facts supervene which terminate the state of suspense, subsequent validation by operation of law, even though retrospective, cannot prevail over the 'real facts'.[5] Similarly, subsequent invalidation has its limits: facts which were once validly created usually 'cannot be undone, cannot be overturned by operation of law'[6] or retrospectively given a different legal character.[7]

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[1] In order to prove this, comparative research would be necessary on so broad a basis as to exceed the scope of this article. It can only be hoped that it will soon be undertaken by others. For present purposes it must suffice to refer to the discussion concerning Roman law and German law by Hellwig, *Grenzen der Rückwirkung*, and von Tuhr, *Allgemeiner Teil des Bürgerlichen Rechts*, vol. ii (1), pp. 21 ff.

[2] A comprehensive investigation of these rules is another task which ought to be undertaken.

[3] *Per* Lord Cairns in *Re Wiltshire Iron Co. Ltd.* (1868), 3 Ch. App. 443, at p. 447.

[4] This occurs, in particular, when a principal ratifies the acts of an unauthorized agent: *Koenigsblatt* v. *Sweet*, [1923] 2 Ch. 314, at p. 325 *per* Lord Sterndale M.R.

[5] *Per* Channell J. in *Re The Gloucester Municipal Election Petition*, [1901] 1 Q.B. 683, at p. 693. This situation arises for example when a third person has acquired title: see s. 227 of the Companies Act, 1948, and the decisions founded upon *Re Wiltshire Iron Co. Ltd., ubi supra*, or *Bird* v. *Brown* (1850), 4 Exch. 786, or *The Gloucester Municipal Election Petition, ubi supra*. Another example is supplied by the rule that, except in the case of maritime insurance, a principal cannot, after a loss has occurred, ratify insurance taken out by his unauthorized agent: *Grover & Grover Ltd.* v. *Mathews*, [1910] 2 K.B. 401. Similarly, ratification by the principal ought not to reinstate a contract purported to be made by his unauthorized agent if before the date of ratification the other party has withdrawn his offer: *Mayor of Kidderminster* v. *Hardwick* (1873), L.R. 9 Exch. 13, at p. 22 *per* Kelly C.B. The decision in *Bolton Partners* v. *Lambert* (1889), 41 Ch.D. 295, it is true, is to the opposite effect, but it is contrary to principle, has been much criticized, has been doubted by Lord Lindley (who, as a Lord Justice, was a party to it) in *Fleming* v. *Bank of New Zealand*, [1900] A.C. 577, and is not being followed in the United States of America. See Williston, *On Contracts*, s. 278A, who says significantly that 'the relation back of a ratification to the time of the original transaction is fictitious and the fiction should be limited so that it will not work injustice'.

[6] *Per* Lawrence J. (as he then was) in *Dodworth* v. *Dale*, [1936] 2 K.B. 503, at p. 519, and see p. 512—a case arising from a decree of nullity on the ground of incapacity. See on the same point *Eaves* v. *Eaves*, [1940] Ch. 109, and *Adams* v. *Adams*, [1941] 1 K.B. 536, among other cases. But see also *Newbold* v. *Attorney General*, [1931] P. 75.

[7] Thus in the case of trespass by relation, retroactivity is limited to the plaintiff's title, but as regards the defendant cannot 'turn into a wrongful act that which at the time it was done was no wrong at all': *Elliott* v. *Boynton*, [1924] 1 Ch. 236, at p. 251 *per* Warrington L.J., at p. 253 *per* Astbury J. And see Denning L.J. in *Wiseman* v. *Wiseman*, [1953] 1 All E.R. 601, 608. The same idea has been developed in connexion with the rule in *Lawes* v. *Bennett* (1785), 1 Cox Eq. 167, which was originally thought to mean that the exercise of the option related back

(3) If the English decisions are analysed from these points of view, there will be room for the impression that the problem is one of great precariousness.

If in *Lynch*'s case[1] the retrospective invalidation of the will was not in issue at all, then this decision does not require consideration in the present context. If, however, under the law of Paraguay the will had retrospectively become invalid, this would have been due to legislation which was clearly of a penal or confiscatory character and which, therefore, could not be enforced in this country even if it had been prospective.

Phillips v. *Eyre*[2] is a more troublesome case. On behalf of the plaintiff it was argued[3] 'that the colonial law was contrary to natural justice, as being retrospective in its character and taking away a right of action once vested, and that for this reason, like a foreign law against natural justice, it could have no extraterritorial force'. But the Court held[4] that 'allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust'. The history of the English practice relating to indemnifying legislation was considered, as was the fact that the law of a British colony was in issue, so that the case did not really involve international aspects. While the plaintiff was undoubtedly deprived of a vested right, 'practical public inconvenience and wrong'[5] was prevented by its retrospective abrogation. The conclusion reached by the Exchequer Chamber would appear to be fully justified, because the colonial legislation remained within the accepted limits of what is a not unusual type of legislation and would have been innocuous in character had it been prospective. But it is not certain whether all foreign Acts of Indemnity should be recognized in England. Would the Exchequer Chamber have taken a different view if the tort complained of had not been assault and false imprisonment, but murder? Or would it have taken a different view if the colonial Act of Indemnity had not been passed by the defendant Governor, the Legislative Council, and the House of Assembly in Jamaica, but if, in the exercise of powers vested in him, the defendant Governor alone had enacted it? Or would it have mattered if in fact there had been no rebellion or if the steps taken to suppress it had been excessive?[6] The delicacy of these questions becomes obvious if one recalls the notorious

to the date of the contract (see, for example, *Lysaght* v. *Edwards* (1875), 2 Ch.D. 499, at p. 520 *per* Sir George Jessel M.R.). But this consequence was rejected by Fry J. in *Edwards* v. *West* (1878), 7 Ch.D. 858, primarily on the ground that 'the retrospective conversion of a person into a trustee of property is a result eminently inconvenient'. That the doctrine does not operate retrospectively to the full extent is now well established: see *Re Isaacs*, [1894] 3 Ch. 506; *Re Marlay*, [1915] 2 Ch. 264; *Re Carrington*, [1932] 1 Ch. 1.

[1] (1871), L.R. 2 P. & D. 268; see above, p. 233, n. 5.

[2] (1870) 6 Q.B.C. 1.

[3] At p. 23.

[4] At p. 27.

[5] Ibid.

[6] In the view of the Court the last-mentioned point would hardly be relevant, since, as the Court pointed out (at p. 27), it involved 'a matter of policy and discretion' and, therefore, could not be subject to judicial investigation.

law by which Hitler purported to legalize the mass murders committed on his behalf on 30 June 1934, allegedly for the purpose of quashing an impending rebellion; it met with universal and righteous condemnation in the civilized world and was described as 'a unique example of the arbitrary exercise of power'[1] or 'of an Indemnity Act emanating from the same person who sought indemnification'.[2] The true test becomes apparent if it is imagined that Hitler's legislation had been prospective in character; in that case it would have included a provision to the effect that if a rebellion is suspected a man who may conceivably be involved in it will not have to be taken into custody or tried by a court, but may be killed without trial. Such a provision could not meet with international recognition.[3]

Starkowski v. *Attorney-General*[4] is a borderline case, and in view of the fact that in all three instances the courts formed unanimous views, any doubt about the decision must be voiced with the utmost diffidence. On the one hand, the House of Lords left open the question whether it would have made any difference if the Croydon ceremony had occurred before the promulgation of the Austrian validating legislation or, at any rate, before the date of the registration of the first marriage in Austria.[5] It may be expected, and it is submitted, that in either event the validity of the Croydon ceremony ought not to have been open to challenge. A new relationship would have come into existence and been consummated, which the *lex loci celebrationis* could not, in justice, undo. Similarly, if before the date of the Austrian registration an English court had declared the Austrian ceremony null and void, the subsequent registration could not have superseded the finality of the English decree. These results may be said to be required not only by the general considerations developed above, but also by the legislative policy of this country,[6] which must be regarded as so fundamental that it should prevail over any different rule followed by other countries.[7] On the other hand, it is equally clear that if the parties to the Austrian ceremony had, at the date of the registration in Austria, still been living together, the retrospective validation of the marriage would have required international recognition. This much is proved by the numerous Marriage Validating Acts which have been passed in this country, and which made a considerable impression on the House of Lords. This much—but no more than this—is also proved by the decision of the Cour de Bordeaux,[1] which was of some influence on the House of Lords. In that case the wife was in 1861 married to the husband in a church in Mexico; by a Mexican Law of 1860 only civil marriages were valid. A Mexican Law of 1865 retrospectively validated religious marriages. The husband died in France in 1880, and the question arose whether the wife had rights of succession. The Court decided in her favour. There is no indication in this decision that in or after 1865 the parties lived apart. On the contrary, it seems to be implied in the facts as stated by the Cour de Bordeaux that the parties continued to live together as husband and wife until the husband's death.

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[1] Bodenheimer, *Jurisprudence* (1940), p. 13.

[2] Loewenstein in *Yale Law Journal*, 45 (1936), pp. 779 ff., 811.

[3] However, it will not always be so easy to draw the line. In the last resort the question will be one of degree.

[4] [1954] A.C. 155.

[5] Lord Morton and Lord Cohen, at pp. 168 and 182 respectively. Lord Tucker (at p. 176) merely left open the question whether it would have mattered if the Croydon ceremony had taken place before the passing of the Austrian Act. Lord Reid referred (at p. 172) to 'some exceptions' that might be necessary, but did not specify them.

[6] See, e.g., ss. 1 and 2 of the Greek Marriage Act, 1884, or s. 1 of the Marriage in Japan (Validity) Act, 1912. The latter includes a proviso to the effect that 'this Act shall not render valid any marriage which before the passing of this Act has been declared invalid by any Court of competent jurisdiction or affect any right dependent on the validity or invalidity thereof or render valid any marriage either of the parties to which has subsequently during the life of the other lawfully intermarried with any other person'.

[7] On the necessity for deducing rules of public policy from the 'fundamental policy of Parliament' see the helpful observations by Kahn-Freund in *Transactions of the Grotius Society*, 39 (1954), pp. 59 ff.

It is at this point that the distinctive and unique difficulty of *Starkowski*'s case falls to be considered: before the registration of the Austrian marriage in 1949 the wife had left, and separated from, the husband, and, in effect, repudiated the marriage.[2] The House of Lords did not regard this fact as significant. Lord Tucker[3] and Lord Asquith[4] perhaps dealt with it to some extent when they referred to the contention that there had been no evidence of the wife's having consented to the Austrian registration. They pointed out that registration was a mere administrative act independent of the will of the parties; this, no doubt, was so under Austrian law, and it may well be that the intention of the parties is immaterial in that validation may occur even if, for instance, they are unaware of it. But could it not be said that the objective basis for recognizing a foreign validation in England should be a *de facto* marriage continuing at the time of the validation?[5] The fiction of retroactivity should not be allowed to operate on a state of affairs which in fact has ceased to exist at the time when the act creating the legal consequences and involving retroactivity is done. As in *Starkowski*'s case the marriage had since 1947 ceased to exist *de facto*, there might have been room for the view that in 1949 the factual basis required to make retroactivity internationally tolerable was no longer sufficient.[1] In *Starkowski*'s case, therefore, it was not the mere feature of retroactivity nor the character of the legislation that gives rise to doubt. The difficulty flows from the particular circumstances of the case, in that there were no facts on which the fiction could fasten. Similarly, if I buy a chattel in Utopia and under the law there in force at the time of the purchase I acquire title, it may happen that subsequently Utopia enacts legislation as a result of which my title is retrospectively annulled. If at the time of the legislation the chattel is still in Utopia, I have lost my title. But if the chattel has been taken to England, Utopian legislation is ineffective to deprive of title on account of the absence of a sufficient factual connexion at the time of the legislation. Or, to make the analogy to *Starkowski*'s case closer, suppose I do not acquire title in Utopia and, after having taken the chattel to England, I return it to the original owner, in reliance upon the absence of title. Utopian legislation then validates my acquisition of title. It is submitted that I cannot recover the chattel from the original owner.

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[1] Decision of 5 February 1883 (*Clunet*, 1883, p. 621). Bartin, op. cit., pp. 299–300, erroneously thinks that a Mexican Decree had again invalidated religious marriages. This was not so in fact, and his criticism of the decision therefore rests on a misunderstanding.

[2] [1954] A.C. 155, at p. 157. The facts bearing on this point are nowhere fully reported. It may be of interest, therefore, to explain that it appears from the printed Record that on 3 October 1947 the wife had told the husband that 'she wanted no more to do with him'. Having been informed by the Registrar at Kitzbühel in a letter dated 30 June 1949 that she was not married, the wife 're-married' at Croydon in February 1950. In the meantime, and without her knowledge, the 1945 ceremony was registered at Kitzbühel on 18 July 1949.

[3] At p. 176.

[4] At p. 177.

[5] It is submitted, however, that the death of one party to a marriage does not necessarily preclude its retrospective validation.

In no event, however, should any general principle be founded upon the decision in *Starkowski*'s case. In particular, it does not by any means permit the conclusion that the converse case of an initially valid, but retrospectively invalidated, marriage would have been decided by the House of Lords in the same sense as by the Tribunal de Tulle.[2] English courts will not overlook the warning uttered by Portalis:[3] 'Partout où la rétroactivité serait admise, non seulement la sûreté n'existerait plus, mais son ombre même.'

In conclusion, reference must be made to the only case in which English law may be said to have rejected the retroactive effect of a foreign law. The decision of the House of Lords in *New Brunswick Rly. Co.* v. *British & French Trust Corporation*[4] related to bonds which had been issued by the defendants, a Canadian company, and which were probably subject to Canadian law. The defendants denied that the bonds included a gold value clause, and thus repudiated their obligations under the bonds. Proceedings were instituted in England, and Hilbery J. dismissed the action. While an appeal was pending, the Canadian Parliament enacted a statute abrogating the gold clause. The House of Lords decided that no effect could be given to the Canadian legislation. The *ratio decidendi* is a little obscure.[5] If it was held that, in fact, the Canadian legislation had no retrospective character, then the decision would not be material in the present context. If retroactivity was rejected because it occurred after the institution of proceedings in this country[1] or after the judgment in the Court of first instance, the decision would turn on a point of procedure and its general significance would not be very great. However, if retroactivity was rejected because it occurred after repudiation, it would be difficult to support it. Canadian law remained applicable even after the date of repudiation, and if it retrospectively encroached upon the extent of the obligation effect should be given to it, just as the French Cour de Cassation in 1876 enforced Spanish legislation.[2] None of the grounds which sometimes militate against retroactivity would seem to be capable of affecting that conclusion.

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[1] It does not appear that an argument on these lines was submitted to the House of Lords.

[2] See above, p. 238, n. 2.

[3] Quoted by Planiol–Ripert–Boulanger, loc. cit., p. 121.

[4] [1939] A.C. 1.

[5] See Dicey, *Conflict of Laws* (6th ed., 1949), p. 729, n. 33, and Mann, op. cit., p. 130, n. 3.

VI

It thus appears that the problem of time in the Conflict of Laws is dominated by the conception of vested rights—a conception which, notwithstanding its long history, is obscure and of little value for the purpose of arriving at decisions in practice. While those who are aware of its limitations will not be led astray by formulae without substance and, therefore, need not discard it, they will be on safer ground if they allow themselves to be guided by the variable requirements of justice and convenience, by what appears to them right in each particular case. The standard can only be set by experience and by a sense of broad equity. It cannot be supplied by logic or legal theory. For this very reason comparative law provides an almost indispensable system of checks and balances. It is against this method of approach that the conclusions reached in the course of the preceding discussion will have to be tested. They are as follows:

1. If the conflict rule forming part of English law is changed by legislation, it is, in the absence of express statutory provisions, a matter of the interpretation of statutes to decide whether and to what extent pre-existing facts and relationships are affected by the change. In so far as the English law governing the interpretation of statutes tends to apply the old law to facts or relationships created under it, it is unlikely that the conflict rule ever confers any 'vested right', seeing that it merely localizes a legal relationship and does not in itself create or affirm individual rights or privileges.

2. If there is a change of the place to which the connecting factor included in the English conflict rule points, the question whether the law of the one or the other country applies cannot be decided otherwise than by judicious weighing of the circumstances of each case, the purpose and intention of the rule under consideration, and the justice and convenience of the results. However, as a matter of principle, the legal significance of

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[1] This seems to have been the view of Lord Maugham (at p. 24).

[2] See above, p. 237, n. 3.

facts and relationships should be assessed by reference to the legal system under the control of which they occur.

In those cases in which English law has not yet reached settled conclusions, the following solutions are suggested:

(*a*) Where there is no marriage contract, the rights of husband and wife to each other's movables are governed by the law of that domicil which exists at the time when the movables are acquired.

(*b*) Facts which occurred before the change of domicil cannot support a petition for divorce under the law of the new domicil, unless they constituted a matrimonial offence under the law of the old domicil.

(*c*) Capacity in regard to non-commercial transactions should be governed by the law of the domicil at the time of the transaction.

(*d*) Apart from s. 3 of Lord Kingsdown's Act, testamentary capacity in regard to movables is governed by the *lex domicilii* at the time of the will.

(*e*) Apart from s. 3 of Lord Kingsdown's Act, the revocation (otherwise than by marriage) of a will disposing of movables is governed by the law of the testator's domicil at the time of revocation.

3. If a change occurs in the municipal law of the country to which the English conflict rule refers, an English judge will, in principle, apply the transitional law of the *lex causae*, even if it is retrospective.

4. However, if the *lex causae* includes legislation having retrospective effect, the English judge will not apply it where the circumstances are such that it would lead to 'inconvenience and wrong'.[1]

No formula can exhaustively and comprehensively define the circumstances in which the exception applies. It is submitted, however, that in general it would be unjust and inconvenient to allow retroactivity to operate

(i) so as to involve recognition or enforcement of legislation which would not be recognized or enforced were it prospective; or

(ii) so as to permit retroactivity to override a factual situation created under the earlier law and terminating the state of suspense.

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[1] The language of Willes J. (see above, p. 242, n. 5).

POLYGAMOUS MARRIAGES IN ENGLISH LAW

By I. M. SINCLAIR, B.A., LL.B.

THE object of this article is to consider how the machinery of English law has adapted itself to the multifarious problems posed by the concept of polygamy as a matrimonial institution.[1] It is a well-known truism that the principles of private international law operate most effectively in relations between legal systems which share a common tradition and culture; conversely, the principles of private international law become subject to unnatural strains and stresses when questions arise involving contact between legal systems disparate in origin and growth. Many illustrations can be given of this difficulty of reconciling and giving effect to the legal principles and institutions appropriate to one society in the territory of another. English law has, for example, on several occasions refused to accord recognition to foreign laws and institutions repugnant to English notions of morality and social conduct.[2] At times, it has even appeared to refuse to accord recognition on grounds of public policy to a foreign status unknown to English law.[3] It is against this background that the question of how far polygamous marriages, and the various incidental matters arising in connexion with such marriages, are recognized in England must be studied.

In this article it is not proposed to make a comprehensive survey of all the questions which can arise in relation to polygamous marriages but to select a number of topics on which fresh light has been shed by recent cases. In view of the fact that English law has not yet developed any fully systematic body of general principles as to the extent to which polygamous marriages are recognized in England, there is perhaps less objection to this piecemeal and empirical approach to the problem than would otherwise be the case. Accordingly, attention will be directed to the following five questions:

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[1] This topic has been considered comprehensively by Sir Dennis Fitzpatrick in *Journal of the Society of Comparative Legislation*, 2 (1900), p. 359; by Mr. W. E. (now Sir Eric) Beckett in *Law Quarterly Review*, 48 (1932), p. 341; and by Mr. J. H. C. Morris in *Festschrift für Martin Wolff* (1952), pp. 287–336. The writer wishes to acknowledge his indebtedness to these authorities.

[2] A contract which tends to promote sexual immorality is illegal in English law and cannot be enforced: *Pearce* v. *Brooks* (1866), L.R. 1 Ex. 213. It cannot be doubted that a foreign contract having the same tendency would not be recognized in England; there is a *dictum* of Wilmot J. to this effect in *Robinson* v. *Bland* (1760), 2 Burr. 1077 at p. 1084. English law has also refused on grounds of public policy to recognize foreign laws permitting slavery to have extraterritorial effect: *Somersett's Case* (1772), 20 St. Tr. 1; *Forbes* v. *Cochrane* (1824), 2 B. & C. 448.

[3] *Worms* v. *de Valdor* (1880), 49 L.J. (Ch.) 261; *In re Selot's Trusts*, [1902] 1 Ch. 488. These two cases involved consideration of the status of prodigality created by French law. They are currently explained on the ground that English law did not refuse recognition to the status *as such*, but refused to recognize the incidents of that status in so far as acts in England were concerned; see Graveson in *Journal of Comparative Legislation and International Law* (3rd series), 26 (1944), Parts III and IV, p. 27; Cheshire, *Private International Law* (4th ed.), p. 149; Dicey, *Conflict of Laws* (6th ed.), pp. 467–8.

(*a*) Nature of ceremony as determining whether marriage is monogamous or polygamous;
(*b*) Validity of polygamous marriage ceremony celebrated in England;
(*c*) Capacity to enter into a polygamous marriage;
(*d*) Recognition of polygamous marriages in England for purposes of:
  (i) Matrimonial jurisdiction of English courts;
  (ii) Legitimacy of and succession by children;
(*e*) Polygamous methods of divorce and recognition in England.

I. *Nature of ceremony as determining whether marriage is monogamous or polygamous*

It may now be taken as established that the question whether a particular ceremony of marriage constitutes a monogamous or a polygamous marriage is in principle determined, not by the personal law of the parties, but by the nature of the ceremony according to the *lex loci celebrationis*. Consequently, if a Mohammedan or a Hindu, having a personal law which permits of polygamy, marries in England at a registry office, he contracts a monogamous marriage.[1] Conversely, if a domiciled Englishman goes through a polygamous ceremony of marriage in a foreign country where polygamy is lawful, he contracts a polygamous marriage.[2] The position would of course be different if the ceremony in the foreign country were monogamous in nature and the marriage was valid as a common law marriage;[3] for this purpose, the question whether in any particular case a ceremony is monogamous or polygamous in nature depends upon the evidence, including the whole of the circumstances surrounding the wedding, the presence of witnesses, the words spoken by the person performing the ceremony, and the cohabitation of the parties as man and wife.[4]

There is one qualification which must be made to the principle that the nature of the ceremony according to the *lex loci celebrationis* determines whether the marriage is monogamous or polygamous. It was formerly considered that the polygamous or monogamous character of the marriage was determined once and for all by the nature of the ceremony according to the

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[1] *Chetti* v. *Chetti*, [1909] P. 67; *R.* v. *Hammersmith Marriage Registrar*, [1917] 1 K.B. 634; *R.* v. *Naguib*, [1917] 1 K.B. 359; *Baindail* v. *Baindail*, [1946] P. 122; *Srini Vasan* v. *Srini Vasan*, [1946] P. 67; *Maher* v. *Maher*, [1951] P. 342. In all these cases the wife was domiciled in England, so there is no direct authority for asserting that the position would necessarily be the same if two persons having a personal law permitting of polygamy married in England in monogamous form. However, it is probable that such a marriage would be treated in England as a monogamous marriage.

[2] *In re Bethell* (1887), 38 Ch. D. 220.

[3] *Wolfenden* v. *Wolfenden*, [1946] P. 61.

[4] *Isaac Penhas* v. *Tan Soo Eng*, [1953] 2 W.L.R. 459.

lex loci celebrationis, and that no subsequent change of domicil or religion by the husband could cause an originally polygamous marriage to become monogamous, or vice versa.[1] This principle has in fact recently been applied in *Mehta* v. *Mehta*,[2] where a marriage had been celebrated in India between an Englishwoman and a domiciled Indian according to the rites of his particular Hindu sect which practised monogamy. It was held that, although the husband could revert to the orthodox Hindu faith and take another wife, the marriage was monogamous in inception and the Court need not look beyond that fact. As against this, the House of Lords decided in the *Sinha Peerage* case[3] that a marriage polygamous in inception could be converted into a monogamous marriage by a change of religion of the parties subsequent to the marriage.[4] Four possible explanations of the decision in the *Sinha Peerage* case have been suggested. In the first place, it can be asserted that the marriage was in fact monogamous;[5] but this is clearly inconsistent with *Mehta* v. *Mehta*, and involves a repudiation of the principle established in *Hyde* v. *Hyde*[6] to the effect that the nature of the institution is determined by the contract entered into by the parties. The second possible explanation is that the marriage, though potentially polygamous in its inception, became monogamous before the petitioner was born and the Letters Patent were issued. However, as Morris[7] has pointed out, this explanation is contrary not only to the view expressed by Fitzpatrick that the monogamous or polygamous nature of the marriage is determined once and for all at its inception, but also to the actual decision in *Hyde* v. *Hyde* where the petitioner had changed his domicil and religion subsequent to the marriage and before he petitioned for divorce and yet the marriage was still held to be polygamous. The third explanation, which is apparently the view held by Fleming,[8] is that as the proceedings did not involve use of the matrimonial machinery of the English courts nor a claim to inherit real estate in England, there was no reason why the marriage should not be recognized as a valid polygamous marriage. The fourth explanation, which has been suggested by Clarence Smith,[1] is that where both parties are subject at the time of the marriage to a personal law which permits polygamy or monogamy, as the case may be, and one party makes a change of domicil and/or religion subsequent to the marriage, the character of the marriage remains the same as it was at its inception; but if, at the time of the marriage, one party is subject to a personal law which permits polygamy and the other is subject to a personal law which enjoins monogamy, and one of the parties makes a change of domicil and/or religion subsequent to the marriage, the character of the marriage will conform to the new pattern of the law which now governs both. This explanation has the merit of reconciling the *Sinha Peerage* case with *Hyde* v. *Hyde*, but it is doubtful whether it is really consistent with the principle that each party must have, by the law of his or her *antenuptial* domicil, the capacity to marry the other.[2] Thus, it has been held that a marriage where one party is domiciled in England and either party is under marriageable age by English law is void, although it would be valid by the *lex loci celebrationis* and the law of the other party's domicil.[3] It can hardly be doubted that the result would be the same even if the incapable party, at some time after the ceremony, acquired a foreign domicil, by the law of which he or she would have had capacity to contract the marriage. By parity of reasoning, it would seem that a marriage between a domiciled Englishman (whose personal law does not permit polygamy)[4] and a Mohammedan lady celebrated in English form in England could not be converted, by a subsequent change of domicil and religion on the part of the husband, *ipso facto* into a valid polygamous marriage entitled to recognition in England. Whether in these circumstances a subsequent polygamous ceremony of marriage between the same parties would produce any effects in England is a more difficult and controversial question, which will be discussed later.[5]

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[1] See Fitzpatrick in *Journal of the Society of Comparative Legislation*, 2 (1900), p. 367.

[2] [1945] 2 All E.R. 690.

[3] (1939), 171 Lords' Journals 350; [1946] 1 All E.R. 348 (n.).

[4] As the *Sinha Peerage* case is an important landmark as regards recognition of polygamous marriages in England, it may be useful to recapitulate briefly the circumstances of the case. By Letters Patent under the Great Seal, a barony was conferred in 1919 on Sir Satyandre Sinha and the heirs male of his body lawfully begotten. In 1880 the first Lord Sinha had married in India, the marriage being potentially polygamous according to Hindu law. Lord Sinha and his wife were converted in 1886 to the Brahmo Samaj sect, which practises monogamy; accordingly, while he remained a member of that sect, he could no longer contract a second marriage which would be recognized as valid in India. In 1887 a son was born of the marriage, and the son now claimed the right to succeed to the peerage on his father's death.

[5] Vesey Fitzgerald in *Current Legal Problems*, 1948, p. 232; Bartholomew in *Modern Law Review*, 15 (1952), p. 38.

[6] (1866), L.R. 1 P. & D. 130.

[7] In *Festschrift für Martin Wolff* (1952), p. 296.

[8] *Conveyancer*, vol. 11 (new series), pp. 209–10.

Of the four explanations so far considered, therefore, none is wholly compatible with the other authorities. Perhaps the least objectionable view is that indicated by Morris,[6] namely, that the *Sinha Peerage* case must be treated as establishing, by strict exception to the normal principle, that a potentially polygamous marriage may become monogamous by reason of a change in the parties' religion or domicil, or of a change in the *lex loci celebrationis* itself, before the events which give rise to the proceedings.

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[1] In *International and Comparative Law Quarterly*, 1 (1952), pp. 310–12.

[2] *Brook* v. *Brook* (1861), 9 H.L. Cas. 193; *Sottomayor* v. *de Barros* (No. 1) (1877), 3 P.D. 1; *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416; *In re Paine*, [1940] Ch. 46; *Pugh* v. *Pugh*, [1951] P. 482.

[3] *Pugh* v. *Pugh* (*supra*).

[4] This is the only explanation of *In re Bethell* (1887), 34 Ch. D. 561, which is really consistent with the other authorities; see Fitzpatrick, loc. cit., at p. 379; Beckett, loc. cit., at p. 347; Dicey, op. cit., p. 227; Cheshire, op. cit., pp. 288–9.

[5] *Infra*, pp. 265–6.

[6] *Festschrift für Martin Wolff*, pp. 301–2, 335.

What this means in effect is that any doubt about the character of the marriage is to be resolved in favour of monogamy; if monogamous in inception, it always remains monogamous, but if polygamous in inception, it may subsequently become monogamous by change of domicil or religion.

Contrary to the generally accepted principle that the question whether a marriage is monogamous or polygamous is determined by the nature of the ceremony according to the *lex loci celebrationis*, several writers have attempted to show that the polygamous or monogamous character of the marriage is determined by the personal law of the husband, irrespective of whether the form of the marriage was, by the *lex loci celebrationis*, a form of monogamous marriage or a form of polygamous marriage. Lord Brougham's famous *dictum* in *Warrender* v. *Warrender*[1] certainly seems to support this view:

> 'An Englishman, marrying in Turkey, contracts a marriage of the English kind, that is, excluding a plurality of wives, because he is an Englishman and only residing in Turkey and under Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently, the incidents and effects, nay the very nature and essence, must be ascertained by the English and not the Turkish law.'

Furthermore, there is a Canadian case, *Connolly* v. *Woolrich*,[2] where Monk J. appears to have drawn a distinction between the *lex loci celebrationis*, which determines whether the status of marriage is created, and the law of the domicil of the husband, which governs the rights, powers and capacities of the parties assuming the status of marriage to have been validly created by the *lex loci celebrationis*. It is interesting to note that Monk J. treated the question of polygamy (i.e. the right of the husband to take more than one wife) as an incident of the status, that is to say, one of the rights, powers and capacities of the parties, to be governed by the law of the domicil of the husband. This would lead to the conclusion (*a*) that if a domiciled Englishman contracted a Mohammedan marriage in a country where polygamy is permitted, he would have effectively contracted a marriage, but a marriage monogamous in character; (*b*) that if a domiciled Englishwoman contracted a marriage in England with a Mohammedan domiciled in a country where polygamy is permitted, a marriage would be created, but the incidents of that marriage, including the right of the husband to take more wives, would be governed by the law of the husband's domicil. The first conclusion is contrary to *In re Bethell*, where the polygamous marriage of a domiciled Englishman was treated as invalid, and the second conclusion is contrary to the many authorities laying down the principle that a marriage celebrated in England in a monogamous form between a Moslem domiciled in a country where polygamy is permitted and a domiciled Englishwoman is a monogamous form of marriage.[1] Consequently, *Connolly* v. *Woolrich* cannot be taken as correctly representing the modern trend of the English cases.[2]

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[1] (1835), 2 Cl. & F. 488.

[2] (1867), 11 *Lower Canada Jurist*, 197.

In considering whether a marriage is monogamous or polygamous in nature three minor points should be noted:

(i) So far as the character of the marriage is concerned, the fact that the husband never exercised his privilege of taking more than one wife, and never intended to do so, is irrelevant.[3]

(ii) If the husband of a polygamous marriage has taken more than one wife, no distinction can be made between them.[4]

(iii) A marriage may be monogamous although neither party to it is a Christian. On this basis, Japanese marriages,[5] and Jewish marriages,[6] have been upheld as monogamous; so also has a marriage ceremony of no recognizable single pattern.[7]

II. *Validity of polygamous marriage ceremony celebrated in England*

This is undoubtedly a question of considerable difficulty, and there are no English cases directly in point. The only two writers who have discussed it at any length are Sir Eric Beckett[8] and Morris.[9]

Sir Eric Beckett considers that a polygamous marriage celebrated in

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[1] *Chetti* v. *Chetti*, [1909] P. 67; *Baindail* v. *Baindail*, [1946] P. 122; and cases cited *supra*, p. 249, n. 1.

[2] It is interesting to note that a modern Belgian case supports the view that the nature of the ceremony according to the *lex loci celebrationis*, rather than the law of the domicil of the husband, determines whether the marriage is monogamous or polygamous. An Iranian subject married a Belgian national in Belgium at a Roman Catholic church, and later purported to marry a Frenchwoman before divorcing his first wife by means of a bill of divorcement; held by the Tribunal Correctionnel de Bruxelles:

(*a*) that the first marriage was a marriage governed by Belgian law to the exclusion of any other form of matrimonial institution;

(*b*) that the Mohammedan divorce would not be recognized in Belgium as being contrary to 'ordre public international';

(*c*) that the second marriage was invalid as the Frenchwoman had no capacity to contract marriage with a man already married.

This decision, which, it appears, indicates a new trend in Belgium, proceeds on the basis that the nature of the marriage depends on the 'presumed intention' of the parties. As the parties had married in monogamous form and had entered into a matrimonial contract incorporating provisions of the Belgian Civil Code, it was clear that the spouses had intended a monogamous marriage; see *Journal du droit international* (*Clunet*), 1954, pp. 439–49.

[3] *Hyde* v. *Hyde* (1866), L.R. 1 P. & D. 130.

[4] *Hyde* v. *Hyde* (*supra*); a South African case, *Estate Canham* v. *The Master* (1909), 26 S.C. 166 (Supreme Court of South Africa), supports this view.

[5] *Brinkley* v. *Attorney-General* (1890), 15 P.D. 76.

[6] *Spivack* v. *Spivack* (1930), 46 T.L.R. 243.

[7] *Isaac Penhas* v. *Tan Soo Eng*, [1953] 2 W.L.R. 459, where the male party was of the Jewish faith and the female party, who was of Chinese descent, belonged to a non-Christian sect; the marriage ceremony was performed after the Chinese fashion in the presence of witnesses, but the husband worshipped according to Jewish custom and the wife according to Chinese rites.

[8] Loc. cit., p. 367.

[9] Loc. cit., pp. 303–8.

England between a Mohammedan domiciled in a country whose personal law permits polygamy and a domiciled Englishwoman, or between two persons whose personal law permits polygamy, might be sustained by application of a principle analogous to that adopted in *Catterall* v. *Catterall*[1] and *Wolfenden* v. *Wolfenden*,[2] namely, that just as domiciled English persons can contract a valid English common law marriage in a foreign country where the only recognized forms of marriage are polygamous ones, so persons of polygamous race can contract a valid polygamous marriage in England where the only recognized forms of marriage are monogamous ones. As Morris[3] has pointed out, however, the marriages in *Catterall* v. *Catterall* and *Wolfenden* v. *Wolfenden* were only sustainable in England and not necessarily in the *lex loci celebrationis*; consequently, the analogy from the two cases cited would only serve to sustain the polygamous marriage in the country of the parties' domicil.

The two cases which Sir Eric Beckett cites in favour of his proposition are *In re Ullee*[4] and *In the Estate of Abdul Majid Belshah*.[5] In both of these cases, a Mohammedan domiciled abroad married two Englishwomen in England in accordance with Mohammedan forms. In *Re Ullee*, the question was whether the first wife was entitled to the custody of the children of the marriage as against the testamentary guardians. Chitty J. found for the testamentary guardians, but he did so on the ground that even if the children were assumed to be illegitimate the Court could have regard to the rights of the putative father and could exercise its discretion in accordance with the interests of the children; this decision on the ground of discretion was upheld by the Court of Appeal. Chitty J. was not prepared to hold that the children were illegitimate, though it appears that he thought the marriage invalid, perhaps for the reason that the wife had no capacity to contract a polygamous marriage.[6] In *Re Belshah*, a Mohammedan domiciled in Baghdad died intestate leaving two English wives whom he had married in England in accordance with polygamous forms. Claims to the estate were made by the two wives and their respective children, each of them denying the right of the other to succeed to any of the estate. Eventually, a settlement was reached by the parties, and this was made an order of the Court.

√ Sir Eric Beckett's argument that the failure of the Court in *Re Belshah* to inform the Treasury Solicitor in order that the Crown might claim the property as *bona vacantia*[1] implies that the Court must have considered the marriages valid is not altogether convincing. The husband died domiciled in Baghdad, and the only question the Court had to determine was who were the persons entitled to succeed to the estate in accordance with the law in force in Baghdad at that time.[2] If the law in force in Baghdad stipulated that the two English 'wives' should succeed, that does not imply that English law recognized the polygamous ceremony as a lawful marriage; in strict law, the only question which the Court had to determine was who were the persons entitled to succeed under the law in force in Baghdad. Furthermore, *Re Ullee* can now be explained on the basis that the children were in fact legitimate even though the marriage was invalid.[3]

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[1] (1847), 1 Rob. Ecc. 580.

[2] [1946] P. 61.

[3] Loc. cit., p. 307.

[4] (1885), 53 L.T. (N.S.) 711; 54 L.T. (N.S.) 286.

[5] *The Times* newspaper, 16 and 18 December 1926 and 14 and 18 January 1927.

[6] 'Even if the ceremony were according to Mohammedan law a marriage binding on the husband, yet still, according to English law, it was not a marriage binding on any spouse of English domicile.'

Neither of these two cases is, therefore, decisive of the point at issue, namely, whether a polygamous ceremony of marriage celebrated in England would constitute a good marriage in English law. There remains to be considered two more recent cases which shed some light on this rather obscure topic; both cases are concerned with the question whether the celebration of a polygamous marriage in England constitutes an offence against s. 39 of the Marriage Act, 1836,[4] which provides that 'every person who . . . shall knowingly and wilfully solemnise any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in the notice [of marriage] and [registrar's] certificate . . . shall be guilty of felony'.

The first case is *R*. v. *Ali Mohamed*.[5] Mr. Dadd, a Mohammedan already married to but separated from his first wife, desired to marry a domiciled Englishwoman. For this purpose he approached his Mohammedan priest, who advised him to go through a civil ceremony at a registry office as a preliminary to the Mohammedan ceremony. Mr. Dadd replied that he could not do so as he was still married to his first wife. After some discussion, the priest agreed to perform the Mohammedan ceremony, having made it perfectly clear to Mr. Dadd that the ceremony would not constitute a valid marriage in England. Humphreys J., after setting out these facts, referred to a document which was put in evidence before him purporting to be a certificate as to the Mohammedan ceremony which had been performed:

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[1] Loc. cit., p. 348.

[2] Cf. *In the Estate of Maldonado*, [1953] 3 W.L.R. 204.

[3] In *Re Bischoffsheim*, [1948] Ch. 79, Romer J. held that the children of a marriage, the validity of which would not be recognized in England, were legitimate for succession purposes on the ground that they possessed the status of legitimacy by the law of their domicil of origin. The decision has been adversely criticized by Welsh in *Law Quarterly Review*, 63 (1947), p. 74; Mann, ibid., 64 (1948), p. 199; Dicey, op. cit., p. 491. It is, however, approved by Cheshire, op. cit., pp. 390–4, and Wolff, *Private International Law* (2nd ed.), p. 388.

[4] Now re-enacted as s. 75 (2) of the Marriage Act, 1949.

[5] Unreported; the case was decided by Humphreys J. at Warwick Winter Assizes (Birmingham Division) on 23 March 1943.

> 'To my mind, that emphasizes what I have already said I am satisfied is the truth of this matter, that he was not intending, and nobody thought that he was intending, to create the status of man and wife between those people at all, but was merely performing a religious ceremony which he knew, and they knew, for he had told them, would be perfectly valueless so far as the English law was concerned inasmuch as they would not be husband and wife as long as they lived in England; and in spite of the very odd form of this translation I think it states that sufficiently clearly.'

Humphreys J. then considered whether, on the facts, there was any case to go to the jury. In deciding that no such case existed, Humphreys J. stated:

> 'In my view, in order to offend against this section of this statute, the solemnization of matrimony must be at least the ceremony which *prima facie* will confer the status of husband and wife upon those two persons—at least *prima facie*—and I cannot think that there is any evidence upon which any jury could say that this ceremony, this religious ceremony, whatever it was called, so performed on this occasion had that effect or was intended to have that effect, or that anybody thought it could have that effect.'

He referred to the case of *R.* v. *Brawn and Webb*,[1] where a second ceremony of marriage celebrated during the subsistence of a first marriage was held to be bigamous, notwithstanding the invalidity of the first marriage, on the ground that 'it is the appearing to contract a second marriage and the going through the ceremony which constitutes the crime of bigamy'.[2] However, that had been a case where prima facie bigamy had been committed by the accused person; here the ceremony was not even prima facie a good English marriage, and was certainly not intended to be such.

It is interesting to contrast the judgment of Humphreys J. in *R.* v. *Ali Mohamed* with the decision of Streatfield J. in *R.* v. *Rahman*.[3] Basically, the facts were the same, in that a Mohammedan priest had purported to perform a ceremony of 'marriage' between a Mohammedan, who was already married to a woman in India, and a domiciled Englishwoman.[4] Streatfield J. ruled that there was a case for the accused to answer. He considered that here, as in the case of a charge of bigamy, a purported marriage is a 'marriage' for the purposes of s. 39 of the Marriage Act, 1836:

> 'Clearly the words "being married" [in the definition of bigamy] mean "being lawfully married" and the words "shall marry" and "second marriage" refer to a marriage which is not only unlawful and void, but which in itself gives rise to a criminal offence, and therefore must mean the purported marriage, or a form of marriage. It matters not whether the bigamous marriage takes place in a registry office or whether it takes place

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[1] (1843), 1 Car. & Kir. 144.

[2] Loc. cit., p. 145, *per* Lord Denman C. J.

[3] [1949] 2 All E.R. 165.

[4] The report gives no further details of the ceremony which was performed.

in a church or a synagogue or other place of worship. It seems clear, therefore, that in that penal Act[1] the word "marriage" means a purported marriage and . . . that is of assistance in determining the meaning of the words "solemnize any marriage in England" in the Act of 1836.'[2]

It is difficult, if not impossible, to reconcile these two conflicting decisions. It may be, however, that they are distinguishable on the facts. In *R.* v. *Ali Mohamed*, it was clear that the accused had expressly informed the parties that the ceremony would not create a valid marriage from the point of view of English law, but there is nothing in the report of *R.* v. *Rahman* to show that the same precaution had been taken. However, whether or not this distinction is maintainable, it is submitted that Streatfield J. did not fully analyse the nature of the question which was before him. It may be admitted that a purported marriage may be a 'marriage' within the meaning of the definition of bigamy in the Offences against the Person Act, 1861, and consequently within the meaning of s. 39 of the Marriage Act, 1836, but the purported marriage must still be proved to be a *form* of ceremony capable of producing a valid marriage assuming there was no incapacity in either party.[3]

Whatever may be the true explanation of these two decisions, they do not supply any real answer to the question whether a polygamous ceremony of marriage in an unregistered building, which is not preceded by a civil ceremony, is a valid form of marriage in England. As Morris[4] has pointed out, the decision in *R.* v. *Rahman*, even if accepted without qualification, does not imply that the marriage celebrated in that case was void.

It is submitted that the formal validity of such ceremonies must be tested by the principle *locus regit actum.* The House of Lords has on at least two occasions[5] affirmed in striking terms the rule that, so far as formalities of marriage are concerned, the *lex loci celebrationis* is decisive.[6] What, then, does English law lay down as the essential formal requirements for the celebration of a valid marriage in England? For this we must look to the Marriage Act, 1949, which consolidated all previous legislation on this subject.

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[1] Offences against the Person Act, 1861, s. 57.

[2] The decision in *R.* v. *Rahman* is not reconcilable with *Burt* v. *Burt* (1860), 2 Sw. & Tr. 88, where it was held that, to sustain a charge of bigamy, there must be proof of such a ceremony as, but for the former marriage, would have constituted a valid marriage. *Burt* v. *Burt* was approved in *R.* v. *Allen* (1872), L.R. 1 C.C.R. 367, where it was asserted that in order to constitute bigamy there must be 'a form of marriage known to and recognized by the law as capable of producing a valid marriage'.

[3] *Burt* v. *Burt*, *R.* v. *Allen*, *supra.* This is not inconsistent with *R.* v. *Brawn and Webb*, for in that case the second ceremony was formally valid.

[4] Loc. cit., p. 305.

[5] *Berthiaume* v. *Dastous*, [1930] A.C. 79; and more recently in *Starkowski* v. *Attorney-General*, [1953] 3 W.L.R. 942.

[6] The only real exceptions to this rule are marriages under the Foreign Marriage Act, 1892, and common law marriages; see Cheshire, op. cit., pp. 314–325.

There are two primary forms of marriage in English law—marriage according to the rites of the Church of England and marriage under a superintendent registrar's certificate. Marriages according to the rites of the Church of England may be solemnized (*a*) after the publication of banns, (*b*) on the authority of a special licence, (*c*) on the authority of a common licence, (*d*) on the authority of a superintendent registrar's certificate.[1] The following marriages may be solemnized on the authority of a superintendent registrar's certificate:

(*a*) a marriage in a registered building;
(*b*) a marriage in the office of a superintendent registrar;
(*c*) a marriage according to the usages of the Quakers;
(*d*) a marriage between two persons professing the Jewish religion according to the usages of the Jews.[2]

It should be noted that a marriage in a registered building on the authority of a superintendent registrar's certificate may be solemnized according to such form and ceremony as the parties may see fit to adopt,[3] provided it is solemnized with open doors in the presence of two or more witnesses and in the presence of a registrar (or authorized person) and provided the parties at some stage of the ceremony utter the statutory words of consent.[4] The requirements for registering a building for the purposes of the Act are not very onerous.[5] Accordingly, it is quite possible for Mohammedan mosques to be registered under the Act for the solemnization of marriages. Any marriage performed in such a place in accordance with polygamous rites would clearly be valid, provided the requirements of s. 44 of the Act were complied with. Furthermore, it is considered that such a marriage would be a monogamous marriage.[6]

A marriage in the office of a superintendent registrar (which is a purely civil ceremony)[7] may be followed by a religious ceremony ordained or used by the church or persuasion of which the parties are members;[8] the religious ceremony does not, however, supersede or invalidate the prior civil ceremony, and it is clear, therefore, that the civil ceremony is the only marriage of which English law takes cognizance.

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[1] Marriage Act, 1949, s. 5.

[2] Ibid., s. 26.

[3] Ibid., s. 44 (1).

[4] Ibid., s. 44 (2) and (3).

[5] Ibid., s. 41.

[6] A South African case, *Mashia Ebrahim* v. *Mohomed Esop*, [1905] Tr. L.R. 59, supports the view stated in the text. In that case, a Malay woman had gone through a Mohammedan ceremony of marriage, performed according to Malay rites in a mosque by a Malay priest, with the respondent in Capetown. It was held that, as the Governor had power under an Act of 1860 to appoint marriage officers for the purpose of celebrating Mohammedan marriages, and as there was no evidence to show that the marriage was not celebrated by such a marriage officer, the marriage must be presumed valid, since a marriage celebrated by such an officer, even according to Mohammedan rites, must be deemed to be a monogamous marriage.

[7] Marriage Act, 1949, s. 45 (2).

[8] Ibid., s. 46 (1).

From this brief summary, it will be seen that English law provides no form for the celebration of a 'marriage' according to polygamous rites in an unregistered building, which is not preceded by a civil ceremony; such marriages would, therefore, in accordance with the principle *locus regit actum* appear to be void if celebrated in England.[1] One caveat should, however, be made; it may be that English law would recognize the validity of a polygamous ceremony of marriage contracted by persons subject to a personal law which permits polygamy when those persons are in a third country where the only recognized forms of marriage are monogamous ones. In other words, while the analogy from common law marriages[2] would probably not operate to save a polygamous ceremony celebrated in England in view of the overriding nature of the principle *locus regit actum*, it might well operate to validate a polygamous ceremony celebrated in some third country. This proposition is advanced with some hesitation,[3] but it can perhaps be supported by reference to recent cases in which the English courts, relying on the principle of reciprocity, have stated that a divorce granted by a court other than the court of the domicil of the parties might still be recognized in England if the foreign court has asserted jurisdiction to entertain the proceedings on grounds substantially similar to those on which an English court would assert jurisdiction in the case of parties not domiciled in England.[4] By analogy, the English courts, having admitted an exception to the principle *locus regit actum* in the case of common law marriages, might well recognize the validity of polygamous marriages between persons subject to a personal law which permits polygamy celebrated in a third country where only monogamous forms of marriage are available.

III. *Capacity to enter into a polygamous marriage*

The next question to be considered is whether persons domiciled in England have capacity to conclude a valid polygamous marriage celebrated in a country where polygamy is permitted or enjoined. The principle which is most consistent with the English authorities is that each party to the marriage must have capacity to marry the other by the law of his or her antenuptial domicil.[1] A marriage between two persons domiciled in England which is within the prohibited degrees of affinity laid down by English law is void even if it is valid by the *lex loci celebrationis*;[2] such a marriage is also void if either party is domiciled in England, although the marriage is valid by the *lex loci celebrationis* and the law of the other party's domicil.[3] Equally, a marriage celebrated in England, although valid in English domestic law, is regarded as invalid if within the prohibited degrees of affinity laid down by the law of the parties' domicil.[4] Conversely, a marriage valid by the *lex loci celebrationis* and by the law of each party's domicil is recognized in England although within the prohibited degrees of affinity laid down by English law.[5]

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[1] This is the view taken by Morris, loc. cit., pp. 306–7; *contra* Beckett, loc. cit., p. 366, and (*semble*) Clarence Smith in *International and Comparative Law Quarterly*, 1 (1952), pp. 309–10. It should be noted that this principle applies only when the status of the marriage itself is in question. It may be that the children of such a 'marriage' would be regarded as legitimate if legitimate by the law of their domicil of origin: *Re Bischoffsheim*, [1948] Ch. 79.

[2] *Supra*, pp. 253–2.

[3] Morris points to the fact that it might lead to the absurd conclusion that a polygamous ceremony celebrated in England might be regarded as valid in Scotland but not in England, and vice versa: loc. cit., p. 307. Equally, however, it would appear that a pre-marriage settlement contract concluded in France and invalid by French law as the *lex loci contractus* may still be recognized in England if valid by English law as the proper law of the contract: *Van Grutten* v. *Digby* (1862), 31 Beav. 561. The absurdity in both cases (if such there be) stems from the original departure from the principle *locus regit actum*.

[4] *Travers* v. *Holley*, [1953] 3 W.L.R. 507; *Dunne* v. *Saban*, [1954] 3 W.L.R. 980.

To the general principle that capacity to marry is governed by the law of the antenuptial domicil of each party there exists one exception, namely, that a formally valid marriage celebrated in England between a person domiciled in England and a person domiciled abroad will not be invalidated by any incapacity attaching to the latter by virtue of the law of such foreign domicil if such incapacity does not exist in English law.[6]

Dr. Cheshire[7] is the one principal authority who dissents from the view that capacity to marry is governed by the law of the antenuptial domicil of each party. He contends that capacity to marry is governed by the law of the 'intended matrimonial home', which is presumed to be the law of the husband's domicil at the time of the marriage. The cases cited to the contrary are explained on the ground that, in most of them, the law of the 'intended matrimonial home' in fact coincided with the law of the antenuptial domicil which was in question, and that the decision in *Sottomayor* v. *de Barros* (No. 2) in fact supports the 'intended matrimonial home' theory although the reasoning in the judgment, it is admitted, does not proceed on the lines of this theory. The 'intended matrimonial home' theory has been criticized by many authorities,[8] and is extremely difficult to reconcile with *In re Paine*,[9] where the orthodox view was plainly accepted.

How does the orthodox view bear examination in relation to the authorities on polygamous marriages? First of all, it must be assumed that no domiciled Englishman has capacity to conclude a polygamous marriage. If the distinctive social policy of English law prevents a domiciled Englishman from contracting a marriage anywhere with a girl under marriageable age by English law, notwithstanding that the marriage is good by the *lex loci celebrationis* and the law of the domicil of the other party,[1] *a fortiori* will the distinctive social policy of English law refuse to permit a domiciled Englishman to contract marriages of a kind repugnant to the concept of monogamy as practised in England? This principle is illustrated by *In re Bethell*,[2] which is now regarded only as authority for the proposition that a domiciled Englishman cannot contract a valid polygamous marriage.[3]

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[1] See Dicey, op. cit., p. 758; Halsbury, *Laws of England* (3rd ed.), vol. vii, p. 91; Wolff *Private International Law* (2nd ed.), p. 336.

[2] *Brook* v. *Brook* (1861), 9 H.L. Cas. 193.

[3] *Mette* v. *Mette* (1859), 1 Sw. and Tr. 416; *In re Paine*, [1940] Ch. 46.

[4] *Sottomayor* v. *de Barros* (No. 1) (1877), 3 P.D. 1.

[5] *Re Bozzelli's Settlement*, [1902] 1 Ch. 751.

[6] *Sottomayor* v. *de Barros* (No. 2) (1879), 5 P.D. 94; *Chetti* v. *Chetti*, [1909] P. 67; cf. also *McDougall* v. *Chitnavis*, [1937] S.C. 390, where the Scottish courts held that the religious disability of the defender, by the law of his Indian domicil, to contract a valid marriage outside Hinduism did not affect the validity of a marriage celebrated in Scotland with the pursuer.

[7] *Private International Law* (4th ed.), pp. 295–311.

[8] Notably Falconbridge, *Essays on the Conflict of Laws*, p. 641, and Morris, *Cases on Private International Law* (2nd ed.), pp. 80–81.

[9] [1940] Ch. 46.

Logically, the same principle should apply where the capacity of a domiciled Englishwoman is in issue. There are indeed *dicta* which can be cited in support of this proposition. For example, in *Re Ullee*,[4] Chitty J. was of opinion that a polygamous marriage celebrated in England between a Mohammedan domiciled in India and a domiciled Englishwoman 'would not be binding on any spouse of English domicile'. Moreover, in *Lendrum* v. *Chakravarti*,[5] Lord Mackay, referring to a possible polygamous marriage between a domiciled Scotswoman and a man whose personal law permitted polygamy, stated that such a marriage 'would offend the law of the capacity of the wife'. In *Risk* v. *Risk*,[6] this was, in fact, the very argument put before the Court. An Englishwoman domiciled in England went through a Moslem ceremony of marriage in Egypt with a domiciled Egyptian; she now petitioned the English Court for a decree of nullity on the ground that, at the time of the marriage, she had no capacity to contract it. Barnard J., relying on *Hyde* v. *Hyde*, refused to entertain the petition on the ground that the marriage, being polygamous, was not one which would entitle the parties to come for matrimonial relief to the courts of this country.[7] Consequently, no pronouncement was made on the merits of the argument advanced by the petitioner, but from a careful reading of Barnard J.'s judgment it would appear that he might well have considered the marriage void for incapacity,[1] although, in view of his finding that the Court had no jurisdiction to entertain the proceedings, he did not have to decide the point.

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[1] *Pugh* v. *Pugh*, [1951] P. 482.

[2] (1887), 38 Ch. D. 220.

[3] The principle is not easily deducible from the judgment, for Stirling J. never once mentioned where the 'husband' was domiciled. Sir Dennis Fitzpatrick has pointed out, however, that this was probably due to the course of argument taken by counsel: *Journal of the Society of Comparative Legislation*, 2 (1900), p. 386.

[4] (1885), 53 L.T. (N.S.) 711; 54 L.T. (N.S.) 286.

[5] [1929] S.L.T. 96.

[6] [1951] P. 50.

[7] The decision is, of course, not very satisfactory. The very point the Court was asked to determine was that the marriage was no marriage by virtue of the incapacity of the petitioner; and the refusal of the Court to entertain the proceedings on the ground of the polygamous nature of the marriage may in itself be regarded as an admission of the invalidity of the marriage in English law; but. cf. Cheshire, op. cit., p. 306, who thinks the case shows that the allegation of incapacity would have failed on the merits.

Both Sir Eric Beckett and Dr. Cheshire consider a domiciled Englishwoman may have capacity to contract a polygamous marriage, notwithstanding that a domiciled Englishman has no such capacity. Sir Eric Beckett[2] considers that a woman who goes through a ceremony of marriage with a man and lives with him on the assumption that she is validly married to him acquires by her residence with him a domicil in the place where his domicil is, even if the validity of the marriage is in issue. He supports this proposition by reference to Lord Morison's judgment on the issue of jurisdiction in *Lendrum* v. *Chakravarti*.[3] However, recent cases have, it is submitted, tended to undermine this proposition. In the first place, there is now a respectable body of authority for the proposition that an English girl who contracts with a foreigner a marriage which is subsequently declared void never loses her English domicil even if the validity of the marriage is the very matter in issue[4] and even if she lives with him for a time in the country of his domicil.[5] In the second place, the case of *In re Paine*[6] has established the principle that a marriage between a domiciled Englishwoman and a man domiciled abroad will be regarded as invalid in England if she has no capacity to contract it by English domestic law. Furthermore, the proposition is open to the verbal criticism that it may involve an *ex post facto* determination of the validity of the marriage, since it is only after the parties are 'married' that one would know whether the woman was in fact going to reside with the man. Dr. Cheshire's view[7] is based upon his 'intended matrimonial home' theory and is open to the same objections. Support for it can, however, be found in Denning L.J.'s judgment in *Kenward* v. *Kenward*,[8] where he states:

> 'Now take a case where an Englishwoman domiciled here marries a man of a polygamous race in his homeland by the ceremonies of his country, intending to live with him there, well knowing that she is entering into a marriage that is potentially polygamous; the substantial validity of that marriage depends on the personal law of the husband and not on the personal law of the wife.[9] . . . So also if she while in England marries a man of polygamous race intending to go to live with him in his homeland,

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[1] This is not the view taken by Vesey Fitzgerald, who considers that Barnard J. held the marriage valid; loc. cit., p. 171. However, Clarence Smith reads the judgment in the opposite sense; loc. cit., p. 308.

[2] Loc. cit., p. 361.

[3] [1929] S.L.T. 96.

[4] *White* v. *White*, [1937] P. 111; *De Reneville* v. *De Reneville*, [1948] P. 100; cf. *Hussein* v. *Hussein*, [1938] P. 159, where the English Court appears to have asserted jurisdiction in nullity proceedings in respect of a void marriage on the basis of the pre-ceremony domicil of the 'wife'.

[5] *McDougall* v. *Chitnavis*, [1937] S.C. 390.

[6] [1940] Ch. 46.

[7] Op. cit., pp. 290–1.

[8] [1951] P. 124 at pp. 144–5.

[9] This type of case is illustrated by *Risk* v. *Risk*, [1951] P. 50, where, it will be recalled, jurisdiction to annul the marriage was refused.

knowing what marriage means in that country, there would be no condition that it should be monogamous, and the marriage would not be made on that basis; and she could not complain if he there took another wife.'

The second part of this statement, which was purely *obiter*, is clearly inconsistent with the series of cases establishing the principle that a Hindu or Mohammedan marrying in England according to English formalities contracts a monogamous marriage.[1] The first part of the statement is certainly not substantiated by Barnard J.'s hesitations in *Risk* v. *Risk*, and, it is submitted, is not consistent with *In re Paine*.

While it must be admitted that the authorities on the point afford no sure guidance,[2] it would seem that the authorities on capacity to marry generally show that the law of the woman's antenuptial domicil has a say in determining whether or not a marriage is essentially valid; and that a domiciled Englishwoman is incapable of contracting a valid polygamous marriage, since the monogamous character of a marriage is much more than a mere question of forms. The objections which have been expressed to the rule stated in this form can perhaps be regarded as directed not so much towards the principle that capacity to marry is governed by the law of the antenuptial domicil of each party as towards the rules which have been developed in English law for determining how and in what circumstances a domicil of origin can be lost and a domicil of choice can be gained. It may be that if the recommendations contained in the *First Report of the Private International Law Committee*[3] on the principles of English law relating to domicil, are adopted by legislation, these objections will be seen to have less substance, since it will then be easier to show, for example, that a domiciled Englishwoman who goes to an eastern country where polygamy is permitted and there marries a man domiciled in that country according to polygamous forms has, in fact and in law, discarded her English domicil before the marriage takes place, in favour of a domicil of choice in the country where the parties will henceforth live and settle down.

IV. *Recognition of polygamous marriages in England*

There are a number of circumstances in which English law may be called upon to determine its attitude towards polygamous unions contracted abroad, but in most cases the primary issue before the court is not the validity of the marriage itself but some other issue, such as the legitimacy of the children, which may incidentally involve consideration of the validity of the marriage. However, in one class of cases, namely, where the parties to a polygamous union seek to invoke the machinery of the English courts for the enforcement of their matrimonial rights and duties, the courts are faced with the difficult task either of applying monogamous principles of matrimonial relief to polygamous unions or of refusing to exercise matrimonial jurisdiction in respect of such polygamous unions. It is proposed to consider briefly (*a*) whether the English courts will exercise matrimonial jurisdiction in respect of polygamous marriages, and (*b*) whether the English courts will recognize the legitimacy of children of a polygamous marriage for purposes of succession to movable property.

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[1] See *supra*, p. 249.

[2] It has already been pointed out that the remarks of Denning L.J. in *Kenward* v. *Kenward* were only *dicta*; so were the opinions of Chitty J. in *Re Ullee* and of Lord Mackay in *Lendrum* v. *Chakravarti*.

[3] Cmd. 9068.

(*a*) *Matrimonial jurisdiction of the English courts*

It must now be taken as settled law that the English courts will not entertain matrimonial proceedings unless the parties are monogamously married.[1] The reason for this self-restraint is not far to seek, and has been forcibly expressed by Lord Penzance:

> 'Now it is obvious that the matrimonial law of this country is adapted to the Christian marriage and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. . . . If these and the like provisions and remedies were applied to polygamous unions, the Court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence.'[2]

This principle has been followed more recently in a Canadian case, *Lim* v. *Lim*,[3] where a claim for alimony by the second wife of a Chinese immigrant to Canada was dismissed by the courts of British Columbia. Moreover, in *Risk* v. *Risk*,[4] Barnard J. appears to have based himself on the authority of *Hyde* v. *Hyde* in denying himself jurisdiction to hear a petition for nullity when the defect alleged was lack of capacity on the part of the woman to contract a polygamous marriage.

An adjunct to this principle, but one which does not necessarily depend upon it, is that a valid polygamous marriage, contracted in India by a man and woman domiciled there, does constitute a bar to a subsequent monogamous marriage by the same man with a domiciled Englishwoman in the sense that the later monogamous marriage will be regarded by the English courts as void.[5]

What is the position in the converse case, where a monogamous marriage in England between a domiciled Englishwoman and a Mohammedan subject to a personal law which permits polygamy is followed by a subsequent

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[1] *Hyde* v. *Hyde* (1866), L.R. 1 P. & D. 130.

[2] Ibid., p. 135.

[3] [1948] 2 D.L.R. 353: a note on this case can be found in *International Law Quarterly*, 2 (1948), pp. 689–90.

[4] [1951] P. 50. As has been pointed out (*supra*, p. 261, n. 7), the decision in this case is not very satisfactory.

[5] *Srini Vasan* v. *Srini Vasan*, [1946] P. 67; *Baindail* v. *Baindail*, [1946] P. 122.

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polygamous ceremony in the country of the husband's domicil between the husband and another woman? There is no authority on this point at all, though in *Lendrum* v. *Chakravarti* Lord Mackay was of the opinion that, in such a case, the subsequent polygamous marriage would 'be an infringement of the contract of monogamy into which he had entered and of the marital rights of the wife under that contract'.[1] Similarly, in the Belgian case referred to previously,[2] the Tribunal Correctionnel de Bruxelles held that a polygamous ceremony of marriage contracted in the Lebanon between *A*, an Iranian subject, and *C*, a Frenchwoman, subsequent to a monogamous marriage contracted in Belgium between *A* and *B*, a Belgian woman, was invalid not only because the Frenchwoman had no capacity to contract such a marriage but also because recognition of the subsequent ceremony as a valid marriage would contravene Belgian *ordre public international.*[3] Consequently, it is submitted that the existence of a valid monogamous marriage between a Mohammedan subject to a personal law which permits polygamy and a domiciled Englishwoman would invalidate a subsequent polygamous ceremony between the Mohammedan and another lady.[4]

An even more difficult case is where *H*, a Mohammedan subject to a personal law which permits polygamy, marries *W*, a domiciled Englishwoman in England. They then return to the country of his domicil where *W* becomes converted to the Moslem faith. *H* and *W* then 're-marry' according to the Moslem faith and *H* subsequently marries *W*2. Would the 'marriage' to *W*2 be recognized as a valid polygamous marriage in England? There is absolutely no authority on this point, but it is submitted that the 'marriage' to *W*2 would not be recognized in England as a valid polygamous marriage. The only marriage of which the English courts would take cognizance would be the monogamous marriage celebrated in England, and *W* would therefore prima facie be entitled to the matrimonial relief of the English courts.[5] Of course, if the issue before the courts was not the validity of the second marriage as such but some extraneous but related issue such as whether the children of the 'marriage' were legitimate for purposes of succession, the court might well find in favour of the children, but this would not be because they regarded the 'marriage' as a valid marriage but because the children had the status of legitimate children by the law of their domicil of origin.

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[1] [1929] S.L.T. 96.

[2] *Supra*, p. 253, n. 2.

[3] '[Attendu] que si, en vertu de leur statut personnel, il faut reconnaître aux sujets des puissances musulmanes le droit d'avoir légitimement plusieurs épouses de leur race selon leurs moeurs, leur religion et leur droit et éventuellement de les entretenir en Belgique, l'ordre public international belge ne tolère cependant pas qu'ils en abusent pour s'arroger le droit d'avoir et d'entretenir en Belgique plusieurs épouses belges ou sujettes de pays où la bigamie et la polygamie sont des crimes; que ce droit, s'il était reconnu, serait destructeur de l'ordre social belge': *Journal du droit international* (*Clunet*), 1954, p. 442.

[4] Again, however, the invalidity of the second marriage would not necessarily involve holding the children of such a marriage to be illegitimate, assuming the legitimacy of the children to be the primary point at issue: *Re Bischoffsheim*, [1948] Ch. 79.

[5] *Sed quaere*, would her conduct have amounted to connivance in, or conduct conducing to, her husband's adultery? See Rayden, *Divorce* (5th ed.), pp. 132–6, 157–60.

(*b*) *Legitimacy of and succession by children*

It is now fairly clear that the children of a valid polygamous marriage[1] would be recognized as legitimate children for the purposes of an intestate succession to movable property governed by English law as the *lex domicilii* of the deceased.[2] The history of the development of this principle is interesting. Despite the fact that Lord Penzance in *Hyde* v. *Hyde*[3] carefully reserved the question whether English law would or would not recognize the legitimacy of children of polygamous unions,[4] Stirling J. held in *Re Bethell*[5] that the child of a potentially polygamous union celebrated in Bechuanaland between an Englishman and a woman belonging to the Baralong tribe was illegitimate and so could not succeed under the will of his grandfather.[6] However, in the later South African case of *Seedat's Executors* v. *The Master*,[7] the children of a polygamous marriage which both parties were capable of contracting were regarded as legitimate for purposes of payment of succession duty. Subsequently, there is Lord Maugham's famous *dictum* in the *Sinha Peerage* case[8] to the effect that it cannot be doubted now 'that a Hindu marriage between persons domiciled in India is recognized in our courts, that the issue are regarded as legitimate, and that such issue can succeed to property in this country, with a possible exception which will be referred to later'. Finally, we have the rather broader language of Lord Greene M.R. in *Baindail* v. *Baindail*:[9]

'If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow.'[1]

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[1] That is to say, a marriage which each party had capacity to contract by the law of his or her antenuptial domicil; see *supra*, pp. 259–63.

[2] *Bamgbose* v. *Daniel*, [1954] 3 W.L.R. 501. This was a Privy Council case concerned strictly with the interpretation of a Nigerian Ordinance incorporating the English Statute of Distribution, 1670; as such, it does not necessarily constitute a binding precedent. See also *infra*, Decisions of English Courts; B. Private International Law, Case No. 4.

[3] (1866), L.R. 1 P. & D. 130.

[4] 'This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves': ibid., p. 138.

[5] (1887), 34 Ch. D. 561.

[6] The explanation of this decision currently accepted is that Stirling, J. decided as he did because at the time of the polygamous marriage the 'husband' was domiciled in England; see *supra*, p. 261.

[7] [1917] A.D. 302; a Mohammedan domiciled in India married *W*1 in India according to polygamous forms and had four children by her in India. He later acquired a domicil of choice in Natal and then married *W*2 according to polygamous forms when temporarily visiting India, and had six children by her. He died domiciled in Natal. The Supreme Court held that the four children by *W*1 were legitimate for purposes of succession, but neither *W*1 nor *W*2 were surviving spouses and *W*2's children were illegitimate.

[8] (1939), 171 Lords' Journals 350.

[9] [1946] P. 122.

All these *dicta* were confirmed in *Bamgbose* v. *Daniel*,[2] where the children of a valid polygamous union were recognized as legitimate for the purposes of succession to an intestacy governed by the English Statute of Distribution, 1670, which was incorporated into the law of Nigeria.

It should be noted that in *Bamgbose* v. *Daniel*, Lord Keith of Avonholm, in delivering the judgment of the Privy Council, referred with approval to the principle laid down in *Re Goodman's Trusts*[3] and *Re Don's Estate*[4] to the effect that the legitimacy or illegitimacy of any individual is to be determined by the law of his domicil of origin. This immediately provokes the following question: what attitude would the courts adopt if they were called upon to determine the legitimacy (for purposes of succession) of children of a polygamous union which one of the parties was incapable of contracting? In *Bamgbose* v. *Daniel*, the question did not arise since it was clear that the deceased had been fully capable of contracting a polygamous marriage. However, there are indications in the judgment of the Court (and particularly in its citation of *Khooi Hooi Leong* v. *Khoo Hean Kwee*[5] and *In re Bischoffsheim*)[6] that the result might well have been the same even if the polygamous marriages had been regarded as invalid because of some defect of capacity in one of the parties.

It might well be objected that any decision in this sense would run directly contrary to *In re Bethell*, where the child of an invalid polygamous marriage was held to be not entitled to succeed to the will of his grandfather.[7] However, the combined effect of *In re Bischoffsheim* and *Bamgbose* v. *Daniel* makes it very doubtful whether *In re Bethell* would now be followed if similar circumstances arose. It is submitted that the principle laid down in *In re Bischoffsheim* (despite the criticism which has been directed against it)[1] is sound, and that children born of a polygamous union, whether the union itself would or would not be recognized as valid in English law, should be regarded as legitimate for purposes of English law if legitimate by the law of their domicil of origin.[2] However, the present state of the authorities is such that this proposition is advanced with considerable reserve. Its principal justification is that the broad tendency of English domestic law, based upon considerations of social policy, is to minimize the distinction between the rights of a legitimate person and of an illegitimate person;[3] by analogy, it is possible to argue that English law would no longer find it so repellent to its notions of public policy to recognize the status of legitimacy conferred upon a child by the law of his domicil of origin, notwithstanding that he is the child of a marriage which English law would not recognize as valid.

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[1] At pp. 127–8. It is worth noting that this *dictum* of Lord Greene's confirms the explanation of *Re Belshah* suggested earlier in this article; *supra*, pp. 254–5.

[2] [1954] 3 W.L.R. 561.

[3] (1881), 17 Ch. D. 266.

[4] (1857), 4 Drew. 194.

[5] [1926] A.C. 529; Lord Keith of Avonholm quoted (with apparent approval) the opinion of Lord Phillimore in that case that 'it is a possible jural conception that a child may be legitimate, though its parents were not and could not be legitimately married'.

[6] [1948] Ch. 79.

[7] The view stated in the text is reached by applying the principle of *In re Bischoffsheim* to the particular facts of *In re Bethell*. According to *In re Bischoffsheim*, the legitimacy of a child for purposes of succession is determined by the law of its domicil of origin. Now Christopher Bethell, the father of the child whose claim to succeed under the will was in issue in *In re Bethell*, died in 1884, ten days *before* the child was born. The child's domicil of origin was therefore (*semble*) the domicil of his mother: see Cheshire, op. cit., p. 174. The mother was clearly domiciled in Bechuanaland if the marriage was invalid, and the child, since it was presumably legitimate by the law in force there at that time, should have been held entitled to succeed.

V. *Polygamous methods of divorce and recognition in England*

It must now be taken as settled law that an English court will not recognize the dissolution of a monogamous marriage by any proceeding under a law applicable to polygamy, even if that law be the law of the domicil of the parties.[4] It is necessary to analyse this proposition with some care. The cases on which it is based are cases where a Mohammedan has purported to dissolve a monogamous marriage contracted in England at a registry office by delivering a *talaq* or declaration of divorcement.[5] In *R.* v. *Hammersmith Superintendent Registrar of Marriages*, three reasons seem to have been advanced for the decision not to recognize the divorce:

(*a*) that it had not been pronounced by a court;

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[1] See, in particular, Dicey, op. cit., pp. 491–4; Morris, *Cases on Private International Law* (2nd. ed.), pp. 171–4; Welsh in *Law Quarterly Review*, 63 (1947), pp. 65–93; Mann, ibid., 64 (1948), pp. 201–2.

[2] Dr. Cheshire approves the principle laid down in *In re Bischoffsheim*, but finds it difficult to reconcile with *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55, and *In re Paine*, [1940] Ch. 46. It is submitted that *In re Paine* is reconcilable with *In re Bischoffsheim* (at least as regards the actual result reached) if, as seems possible, the domicil of origin of the child in *In re Paine* was England; the method of approach in the one case, however, differed radically from the method of approach in the other, for Bennet J., in *In re Paine*, was only concerned with the validity of the parents' marriage and not with the status of the child as such.

[3] Thus, under social security legislation, an allowance or benefit may in certain cases be payable in respect of an illegitimate child or other illegitimate relation; see Family Allowances Act, 1945, ss. 3 (1), 21 (2), 21 (5); National Insurance Act, 1946, ss. 14, 16 (2), 19, 23, 24, and 78 (2); National Insurance (Industrial Injuries) Act, 1946, ss. 17, 18, 21–24, and 88 (2). Likewise, for the purposes of a claim under the Fatal Accidents Acts, 1846–1908, a person is deemed to be the parent or child of a deceased person notwithstanding that he was only related to him illegitimately: Law Reform (Miscellaneous Provisions) Act, 1934, s. 2.

[4] *Maher* v. *Maher*, [1951] P. 342, following *R.* v. *Hammersmith Superintendent Registrar of Marriages*, [1917] 1 K.B. 634.

[5] This is a device whereby the husband can unilaterally repudiate and divorce his wife by uttering certain words in the presence of witnesses or by giving a bill of divorcement; for the various forms of *talaq* see Fyzee, *Outlines of Muhammadan Law* (1949), pp. 128–32.

(*b*) that the divorce was contrary to natural justice since the wife had had no notice of the proceedings;

(*c*) that the method of divorce by *talaq* is only applicable to Mohammedan marriages, not to English monogamous marriages.

Grounds (*a*) and (*b*) are open to various objections, and it is doubtful whether they are now good law. As regards ground (*a*), it is sufficient to recall that in *Har-Shefi* v. *Har-Shefi* (No. 2),[1] Pearce J., confronted with a Jewish divorce,[2] recognized it as valid in England because it would be recognized as valid by the law of the domicil of the parties, notwithstanding that it was not the outcome of judicial proceedings. The validity in England of extra-judicial divorces, whether effected in, or recognized by, the country of the domicil of the parties, can therefore now be assumed, notwithstanding the *dicta* in *R.* v. *Hammersmith Superintendent Registrar of Marriages*.

Ground (*b*) is equally unsatisfactory. There is certainly some point in insisting upon adequate notice being given to the wife where the giving of such notice would enable the wife to contest the divorce; but where the act of divorce can be performed unilaterally by the husband, the requirement of notice becomes supererogatory since no amount of notice will enable the wife to defend herself. Furthermore, the cases in which the English courts have refused recognition to foreign divorces because of absence of notice to the wife[3] are now distinguished on other grounds.[4]

In *Maher* v. *Maher*,[5] Barnard J. specifically rejected ground (*b*), but refused to recognize the Mohammedan divorce on the ground that 'a marriage in the Christian sense . . . cannot be dissolved by a method of divorce which is appropriate to a polygamous union'.[6] While this must be accepted as judicial confirmation of ground (*c*) in *R.* v. *Hammersmith Superintendent Registrar of Marriages* and while ground (*c*) is more easily defensible than the other two grounds suggested in that case, the result is not altogether satisfactory, since it creates a special class of case in which a divorce obtained in accordance with the law of the domicil of the parties is refused recognition in England.[7]

In this connexion, there is one type of situation which has not yet come before the English courts and which raises an interesting point of classification. It is apparently a principle of Mohammedan law that a Muslim woman cannot marry a Christian;[1] it is equally established that a convert to Islam is immediately governed by Mohammedan law.[2] What then happens when a monogamous marriage has been celebrated between two Christians and, after the parties have become domiciled in a country where Mohammedan law prevails, the wife embraces Islam? The husband petitions the courts of his domicil for divorce on the ground of adultery, but the court declares the marriage dissolved on the ground that the wife's conversion to Islam entails the automatic dissolution of the marriage.[3] Would a divorce of this type be recognized in England? It is a divorce by a court of the domicil of the parties, but it is a divorce obtained by the application of a principle of Mohammedan law. The arguments for and against recognition are closely balanced. On the one hand, it can be said that this is a divorce obtained in the courts of the domicil of the parties on grounds permitted by the law of the domicil; and as the English courts do not concern themselves with the grounds on which the courts of the domicil of the parties base their decrees,[4] the divorce is entitled to recognition in England. On the other hand, it can be argued that the foreign divorce is specifically based upon a principle of a system of law that recognizes polygamy and should accordingly be refused recognition; or, perhaps more cogently, that as the basis for the divorce was a situation created by the party in whose favour the divorce was granted, the decree should be refused recognition as being contrary to natural justice, since it amounts to allowing one party to dissolve at will a regularly contracted monogamous marriage by a unilateral act (namely, change of religion) irrelevant to the continued existence of such a marriage. The question whether or not such a decree would be recognized in England is by no means free from doubt, but it is submitted that the factors which militate against recognition probably outweigh those in favour of recognition.

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[1] [1953] 3 W.L.R. 200, following *Sasson* v. *Sasson*, [1924] A.C. 1007.

[2] Divorce is apparently effected according to Jewish Rabbinical law by delivery of a bill of divorcement or *gett* by the husband to the wife before an ecclesiastical body. It does not in any sense involve a judicial investigation (at p. 202).

[3] *Rudd* v. *Rudd*, [1924] P. 70; *Shaw* v. *Attorney-General* (1870), L.R. 2 P. & M. 156.

[4] See *Igra* v. *Igra*, [1951] P. 404.

[5] [1951] P. 342.

[6] Ibid., p. 346.

[7] For a further discussion of *Maher* v. *Maher*, see this *Year Book*, 28 (1951), p. 408.

VI. *Conclusions*

Where the state of the law is so uncertain, it is difficult to postulate definitive conclusions. However, the following principles are believed to represent what the law is at present:

1. The question whether a marriage is monogamous or polygamous in character is determined by the nature of the ceremony according to the *lex loci contractus* and not by the personal law or intentions of the parties at the time of the marriage or subsequently;

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[1] Fyzee, *Outlines of Muhammadan Law*, p. 80.

[2] Ibid., p. 154.

[3] Apparently, this could not happen in India; see Fyzee, op. cit., pp. 159–60. It might, however, happen in other countries where Mohammedan law is applied.

[4] *Bater* v. *Bater*, [1906] P. 209.

Provided that:

(*a*) the monogamous or polygamous character of a *common law* marriage is determined by the nature of the ceremony alone;

(*b*) a marriage polygamous in character may become monogamous by reason of a change in the religion or domicil of the parties subsequent to the marriage but before the events which give rise to the proceedings.

2. A marriage celebrated in England in accordance with polygamous forms and without any civil ceremony as required by English law is void, whatever the personal law of the parties; but (*semble*) such a marriage if celebrated in a third country where only monogamous forms of marriage are available may be recognized in England if the marriage is valid by the personal law of both parties.
3. A man or woman whose personal law does not permit polygamy has no capacity to contract a polygamous marriage.
4. A polygamous marriage will be recognized as a valid marriage if, and will not be recognized as a valid marriage unless, each of the parties had capacity to contract it by the law of his or her antenuptial domicil, and, subject to the possible exception to rule 2 above, the marriage was formally valid by the *lex loci celebrationis*.
5. A valid polygamous marriage invalidates a subsequent monogamous marriage and (*semble*) a valid monogamous marriage invalidates a subsequent polygamous marriage valid in other respects.
6. The parties to a polygamous marriage (whether valid or not) are not entitled to invoke the jurisdiction of the English matrimonial courts.
7. The children of a polygamous marriage (whether valid or not) are legitimate for purposes of succession if legitimate by the law of their domicil of origin.
8. A monogamous marriage cannot be dissolved by any procedure applicable to or based upon a system of law recognizing polygamy.

These propositions reflect the hesitation and doubt to which the English courts have on many occasions given vent when confronted with cases involving the validity of polygamous unions or the incidental questions arising in connexion with such unions. The main reason why these propositions, taken as a whole, are unsatisfactory is the principle that a man subject to a personal law which permits polygamy can contract a monogamous marriage in England. However, the illogicality of this rule must be accepted unless and until legislation is passed prohibiting persons subject to a personal law which permits polygamy from contracting marriage in England or permitting as a matter of form the celebration of polygamous marriages in England. There are, however, objections to both these remedies. The first would be difficult to apply administratively and would in any event be open to objection as restricting the freedom of the individual to marry. The second would not noticeably advance matters since domiciled English persons would still be incapable of contracting such marriages in England. Moreover, it should perhaps be noted, in support of the present system, that it no longer involves so much hardship for the domiciled Englishwoman who contracts a marriage with a polygamist in England. She is now able to invoke the matrimonial jurisdiction of the English courts in respect of the marriage (after the statutory period of three years' residence in England) and her position seems little different from that of domiciled Englishwomen who marry other foreigners. On balance, therefore, there is much to be said for retaining the present system, however illogical it may be, whereby a polygamist who contracts marriage in England in accordance with English forms contracts a monogamous marriage.

There is much less to be said in favour of the rule which forbids the English courts from pronouncing the nullity of a polygamous form of marriage contracted by a domiciled Englishwoman or Englishman. There are cogent reasons why the matrimonial relief of the English courts should be refused to parties who have contracted a valid polygamous marriage, but why this rule should be extended to cases where the very validity of the marriage is being put in issue is rather puzzling.

For the rest, it is to be hoped that the courts will follow the recent trend of treating legitimacy as a question of status, to be determined, independently of the validity of the marriage of the parents, by the law of the domicil of origin of the child in question. The adoption of this principle would mitigate the hardship consequent upon a finding that a polygamous marriage is invalid because of some defect in the capacity of one of the parties.

VOTING IN THE GENERAL ASSEMBLY OF THE UNITED NATIONS

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By comparison with the volume of literature on the voting rule in the Security Council, little has been written about voting in the General Assembly. No doubt the reason for this is that the rule in the Assembly has on the whole been considered satisfactory, while that in the Council has not. In fact, voting in the Assembly has given rise to its own problems which deserve attention. The need to examine these problems has increased as the centre of gravity of the Organization has tended to shift from the Council to the Assembly.[1]

It is not the purpose of this article to give an exhaustive analysis[2] of either the relevant provisions of the Charter or the practice of the General Assembly and the Security Council in applying them. It is rather to offer comment on the historical background of those provisions and, with special reference to the General Assembly, on their scope and importance and some of the legal problems that have arisen in their application. These subjects were touched upon in an article on the relations between the Assembly and the Council in this *Year Book* for 1952.[3] That article was primarily concerned with the functions of those organs: the present essay is concerned with the mechanism for exercising their functions.

I. *Voting at conferences*

Voting at international meetings is a comparatively modern device for making decisions on political matters. As recently as 1906, at the Conference of Algeciras, Count Goluchowski is reported to have said:[4]

'Dans une conférence on ne vote pas: et ce pour une raison bien simple, c'est que l'unanimité est requise. A quoi bon compter les voix pour et contre, du moment qu'une seule voix contre suffit à écarter les mesures proposées?'

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[1] There are signs that Governments are beginning to consider more seriously the question of voting in the Assembly. At its Ninth Session, an item on certain aspects of the question was placed on its agenda by France, and during 1954 a Staff Study on 'Representation and Voting in the United Nations General Assembly' was prepared for the Subcommittee on the United Nations Charter of the United States Senate Committee on Foreign Relations. See the Explanatory Memorandum submitted by France in U.N. Doc. A/2700/Rev. 1, and see 83rd Congress, 2nd Session, Staff Study No. 4. In the preface, Senator Alexander Wiley said:

> 'The veto, in some ways, gives the big states too much power. In the General Assembly, where each state has one vote, the little nations have too much power. . . . This report shows that it is possible, for example, for a majority to be obtained in the General Assembly by states representing about 5 per cent. of the population of the members of the organization.'

[2] For an analytical study of the veto see Day, *Le Droit de veto dans l'Organisation des Nations Unies* (1952). See also Brugière, '*Droit de veto*'. *Le règle de l'unanimité des membres permanents au Conseil de Sécurité* (1952).

[3] See this *Year Book*, 29 (1952), p. 63.

[4] See Satow, *International Congresses*, p. 3, in *Peace Handbooks*, vol. xxiii (No. 154).

The only vote taken at the Conference of Algeciras was on a proposal that it should meet in committee on a certain date to take up a particular question. However, even before 1906, it had become normal practice to vote on points of procedure. At conferences of a technical character, decisions not regarded as of great political importance were sometimes taken by majority vote.[1] Preliminary votes to ascertain the general sense of a political conference were also sometimes taken, as at the Congress of Berlin, but the governing principle was that matters of political importance could not be settled by vote or by majority.[2] A conference or congress had no coercive power: the majority could not bind the minority. According to Satow,[3] this principle was based upon the theory of the political equality of independent States, 'a recognized doctrine of International Law': it was a consequence of their independent sovereign character. It was also a constant and salutary reminder that the settlement of disputes and differences on vital matters was dependent on discussion and compromise rather than on coercion.

This was certainly true among the Great Powers themselves, but, at least from the beginning of the nineteenth century, they had had no difficulty in persuading the smaller Powers to accept whatever they agreed among themselves. They strove with success to keep control of affairs in their own hands. Thus, for example, on the defeat of Napoleon, Austria, Prussia, Russia and Great Britain were responsible for the assembly of the Congress of Vienna in September 1814, but the Congress was dissolved in 1815 without having met in plenary session. By the Treaty of Alliance of 20 November 1815, the Four Powers agreed to meet at fixed periods to consider measures for the 'repose and prosperity of nations, and for the maintenance of the Peace of Europe'. The meetings ceased after 1822, but the Great Powers continued their efforts to maintain the peace of Europe by concerted action. This was arranged principally through diplomatic channels. There were also the great conferences and congresses[1] of the nineteenth and early twentieth centuries, but, until the formation of the League of Nations after the First World War, there was no international organization charged with the duty of maintaining the peace. Conferences there were, but these were governed by the influence of the Great Powers. They were not subject to the rule of majority vote.

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[1] The progress towards the practice of voting is well illustrated by the Hague Conferences of 1899 and 1906. Commenting on them, Dunn (*The Practice and Procedure of International Conferences* (1929)) says: 'At the Hague Conferences it was soon found that a strict application of the unanimity rule in all voting would have made practically impossible the reaching of any agreements whatever. There was accordingly developed the fiction of "quasi-unanimity" which recognized as unanimously accepted a proposal receiving a substantial majority of the votes cast. Thus, when the formula arrived at by the First Committee of the First Conference for the suppression of the use of explosive bullets of a certain size was voted on by the Conference, the minutes solemnly record that it was "adopted *unanimously* with the exception of two votes (United States and Great Britain) and one abstention (Portugal)".' (At pp. 129–30.)

[2] Commenting on the unanimity rule in voting at international conferences as a serious obstacle to the development of the conference method, Dunn says: 'While in practice the rule has been frequently modified or ignored in recent years, it still is advanced by many authorities as an absolute proposition that permits of no exceptions. This view is commonly justified on two grounds: (1) that it is an unavoidable deduction from the conceptual nature of the international community; and (2) that it has the sanction of universal custom.' (Op. cit., pp. 125–6.)

[3] Op. cit., p. 2.

II. *Voting in the League of Nations*

The League of Nations introduced a new method, directly relevant for the purposes of the present discussion, for maintaining peace and security. Previously, the conference method—the settlement of political issues by *ad hoc* meetings—had been used. The creation of an international organization was a novelty. An organization is essentially different from a conference or a series of conferences. States taking part in a conference are entirely free to accept or reject its conclusions. An instrument drawn up by a conference has no legal effect except so far as it is accepted by States. An organization, by contrast, has a legal personality of its own. It can adopt resolutions and may even be able to take decisions binding on a member State. These resolutions may depend for their legal effect, not on acceptance by the members, but on the rules of the organization. Accordingly, the machinery by which an organization adopts its resolutions and arrives at its decisions is relatively of great importance.

It was perhaps inevitable that in drafting the Covenant of the League full advantage was not taken of the possibilities inherent in the creation of an organization and that, in the matter of voting, the conference pattern was followed. Decisions of both the Assembly and the Council were to be subject to the unanimity rule, except that matters of procedure were to be decided by a majority of Members of the League represented at the meeting.[2] Between 1919 and the outbreak of the Second World War, there was some mitigation of the full rigour of the unanimity rule. Both the Assembly and the Council of the League adopted rules of procedure which modified the language of the Covenant so as to exclude the need for unanimity where otherwise provided by the terms 'of *a* treaty' instead of by the terms 'of

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[1] See Satow, op., cit., for a list of these.

[2] Article 5 of the Covenant of the League of Nations read as follows:

'Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

'All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council, and may be decided by a majority of the Members of the League represented at the meeting.'

the present Treaty'.[1] This was in accordance with an Advisory Opinion of the Permanent Court of International Justice to the effect that the Council could undertake to give a decision by a majority in specific cases if express provision was made for that power by treaty stipulations.[2] Again, the Assembly and the Council distinguished 'voeux' and 'recommendations' from 'decisions' and did not insist on unanimity for the former, although the Council was not as ready as the Assembly to depart from the unanimity rule in this way. The rule was, however, further mitigated by its disregard in committees of the Assembly, by the rule of procedure in the Assembly and the practice in the Council that representatives who abstained from voting were to be considered as not present, and by a wide interpretation given in both bodies to the expression 'matters of procedure'.[3]

III. *The San Francisco Conference*

Viewed against the background of the League of Nations and the practice at international conferences, the voting rules in the Charter of the United Nations appear as a considerable advance—a natural step forward. That background also makes it easier to see in better perspective the departures in the Charter from the democratic method of majority rule. The most significant of these is, of course, the requirement of unanimity of the five permanent members of the Security Council; in other words, the veto. In fact, it was generally recognized at the San Francisco Conference[4] that the veto must apply to enforcement action. The battle was not for the elimination of the veto, but for the limitation of the matters to which it should apply. Thus, the Australian delegate[5] drew a distinction between pacific settlement of disputes (Chapter VI of the Charter) and action taken to deal with threats to peace or acts of aggression (Chapter VII). The voting formula agreed at Yalta[6] and submitted by the Sponsoring Powers to the San

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[1] I.e. any one of the four Peace Treaties in which the Covenant of the League was set forth.

[2] *Interpretation of the Treaty of Lausanne*: Publications of the Permanent Court of International Justice, Series B, No. 12, p. 30.

[3] For a general discussion of voting in the League of Nations see Stone, 'The Rule of Unanimity: The Practice of the Council and Assembly of the League of Nations', in this *Year Book*, 14 (1933), p. 18.

[4] For a full and valuable examination of the legislative history of the voting rules of the Security Council and the General Assembly see Koo, Jr., *Voting Procedures in International Political Organizations* (1947), Chapters iv and v.

[5] Committee III/1, ninth meeting: U.N.C.I.O., *Documents*, vol. 11, p. 309.

[6] The formula agreed at Yalta was announced on 5 March 1945 and, for the purposes of the San Francisco Conference, added as Chapter VI, Section C, to the Dumbarton Oaks Proposals of 7 October 1944. It read as follows:

> 'Section C. Voting. 1. Each member of the Security Council should have one vote.
>
> '2. Decisions of the Security Council on procedural matters should be made by an affirmative vote of seven members.
>
> '3. Decisions of the Security Council on all other matters should be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VIII, Section A, and under the second sentence of paragraph 1 of Chapter VIII, Section C, a party to a dispute should abstain from voting.'

Francisco Conference drew no such distinction in relation to the veto. Accordingly, the Australian delegation submitted an amendment for the purpose of excluding the application of the veto to decisions of the Security Council concerning the pacific settlement of disputes. After debate at many meetings of Committee III/1, this amendment was defeated by a vote of 10 affirmative, 20 negative, and 15 abstentions. In consequence, other amendments to the Yalta voting formula, which were regarded as a greater departure from the original text, were not put to the vote.[1]

The Australian amendment in its final form would have achieved its purpose by classifying decisions under Chapter VI of the Charter (Pacific Settlement of Disputes) as decisions on procedural matters. Such a classification would have been illogical, but the amendment was indicative of the realization by the smaller Powers that there was no real hope of shaking the determination of the Sponsoring Powers to maintain the Yalta Formula virtually intact. It was for this reason that the attack of the smaller Powers, which began on the scope of application of the veto, was later concentrated on the tests for determining what matters should be treated as procedural and therefore should not be subject to the veto. They were ultimately left with a plea that, if they were compelled to accept the veto, at least the process of amendment of the Charter should be free from the veto of the Great Powers.

The Yalta Formula first came up for consideration at the ninth meeting of Committee III/1 on 17 May 1945. Several amendments were submitted designed either to remove the veto or to limit its scope.[2] At the tenth meeting, on 18 May, a Sub-Committee was established 'in order to clarify the doubts that have arisen during the course of discussion'.[3] On 22 May, the Sub-Committee submitted a questionnaire[4] on the exercise of the veto to the Sponsoring Powers. It contained twenty-two questions, to which the Greek delegation added a twenty-third regarding the application of the veto to a recommendation of the Security Council to the Assembly in respect of the election of the Secretary-General. The first twelve questions related to various steps in the pacific settlement of disputes; question 13 related to references to the International Court of Justice; questions 14 to 18 related to various preliminary decisions short of enforcement measures that might be taken under Chapter VII of the Charter. Question 19 was of prime importance. It read:

> 'In case a decision has to be taken as to whether a certain point is a procedural matter, is that preliminary question to be considered in itself as a procedural matter or is the veto applicable to such preliminary question?'

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[1] Report of the Rapporteur of Committee III/1: U.N.C.I.O., *Documents*, vol. 11, at p. 685.

[2] Annex I to the Report of the Rapporteur of Committee III/1: U.N.C.I.O., *Documents*, vol. 11, p. 693.

[3] Ibid., p. 331.

[4] Ibid., p. 699.

Questions 20 and 21 related to the effect of abstention by one of the permanent members and question 22 asked whether a permanent member would be entitled to vote on the question whether that member is a party to a particular dispute.

At its eleventh meeting, on 21 May,[1] Committee III/1 completed its general discussion of the Yalta Formula. The debate was in effect transferred to the informal committee of five[2] composed of experts representing the four Sponsoring Powers and France. It was not until 7 June that the Sponsoring Powers produced their answer to the questionnaire in the form of a Statement, to which the French delegation also subscribed.[3]

The only question to which the Statement gave a direct answer was question 19. It gave no answer as to the effect of an abstention by one of the permanent members of the Security Council. For the rest, it was a general statement of the attitude of the delegations of the Sponsoring Powers towards the whole question of unanimity. Its main theme was that, apart from matters of procedure, which would be governed by a vote of any seven members, decisions by the Security Council might have major political consequences and might even initiate a chain of events leading in the end to enforcement action. Accordingly, the rule of unanimity must apply to all such decisions and the distinction between decisions under Chapter VI and Chapter VII of the Charter was rejected. The answer to question 19 was to the effect that the veto would apply to the preliminary question whether a matter was one of procedure or not.

When Committee III/1, on 9 June,[4] reopened its debate on the voting procedure for the Security Council, discussion was on the basis of the Statement by the Sponsoring Powers. The Statement was subjected to much criticism on the ground that it was inadequate in substance and vague in expression, but the delegations of the Sponsoring Powers made it plain that the Statement represented the maximum that could be agreed among them and the most that they were prepared to yield. The upshot was that the Statement was neither accepted nor rejected by the Committee, which, without taking a vote on it, passed to the Australian amendment. On 13 June,[5] the Yalta Formula was put to the vote and adopted without change.

The legislative history of the voting rule of the General Assembly is not of special significance. The principal discussion at the San Francisco Conference was with respect to the inclusion or exclusion of particular matters from the list of important matters requiring a two-thirds majority vote and the question of loss or suspension of the voting rights of members in the General Assembly.

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[1] U.N.C.I.O., *Documents*, vol. 11, p. 347.

[2] See Koo, op. cit., pp. 170 ff.

[3] U.N.C.I.O., *Documents*, vol. 11, p. 711. Notwithstanding the importance of this document, space does not justify its reproduction here. It is printed in full in Koo, op. cit., p. 336, and in Goodrich and Hambro, *Charter of the United Nations* (2nd ed., 1949), p. 216.

[4] U.N.C.I.O., *Documents*, vol. 11, p. 429. The discussion was continued at the seventeenth, eighteenth and nineteenth meetings on 11 and 12 June. See U.N.C.I.O., *Documents*, vol. 11, pp. 452, 469, 486.

[5] Twentieth meeting of Committee III/1: U.N.C.I.O., *Documents*, vol. 11, p. 510.

IV. *Voting in the General Assembly*

(*a*) *Introduction*

The importance of voting in the General Assembly should not be underestimated. It is the balance-wheel which controls the whole mechanism. Voting is as frequent in the Assembly as it was rare in the nineteenth-century political conferences. All matters of procedure are subject to decision by voting, and some of these are of real political significance. For example, the question of the representation of China has on a number of occasions been postponed by decisions that it should not be discussed during the session or before a certain date.[1]

There are many matters, apart from those of a procedural nature, on which a vote in the General Assembly is decisive either alone or together with a decision or recommendation of the Security Council. The General Assembly elects the non-permanent members of the Security Council[2] and the members of the Economic and Social Council[3] and some members of the Trusteeship Council;[4] on the recommendation of the Security Council, the Assembly admits new Members to the United Nations,[5] may suspend the rights and privileges of membership[6] or expel Members;[7] the Assembly is the authority which approves the budget of the Organization and apportions the expenses among the Members.[8] All these questions involve decisions which have a direct or indirect effect on the rights and liabilities of Member States. They are not mere recommendations. They are decisions which have specific legal consequences and they are effective and binding for the Members of the Organization. They are all decisions on 'important questions' for the adoption of which a two-thirds majority of the members present and voting is required by paragraph 2 of Article 18 of the Charter. There are, however, many other questions under the Charter on which the Assembly may not merely make recommendations but may make decisions by simple majority.[9] These include the Assembly's part in the election of the Judges of the International Court of Justice[1] and in the appointment of the Secretary-General.[2] They may also include such matters as the establishment of subsidiary organs,[3] the approval of international conventions submitted by the Economic and Social Council,[4] and the submission of requests to the International Court for Advisory Opinions.[5] These examples are by no means exhaustive, but, in addition, the Assembly may make recommendations on any matters within the scope of the Charter.[6] It is only when, with all this in mind, due account is taken of the political consequences of the debates and resolutions of the General Assembly, that it is possible to make a fair appraisal of the importance of voting in the Assembly. The process of deliberation starts with a vote on the adoption of an agenda item and ends with a vote on a resolution.

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[1] This was first done at the Sixth Session. See *Official Records* of the Sixth Session of the General Assembly, Plenary Meetings, pp. 99–104.

[2] Charter, Article 23.

[3] Article 61.

[4] Article 86.

[5] Article 4.

[6] Article 5.

[7] Article 6.

[8] Article 17.

[9] Throughout the present article the expression 'simple majority' means 'a majority of the Members present and voting', and the expression 'a two-thirds majority' means 'a two-thirds majority of the Members present and voting'.

(*b*) *Comparison of Articles 18 and 27[7] of the United Nations Charter*

The voting rule for the General Assembly is contained in Article 18 of the Charter, which reads as follows:

> '1. Each member of the General Assembly shall have one vote.
>
> '2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 (*c*) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.
>
> '3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.'

There are certain apparent similarities between Article 18 and Article 27 (Voting in Security Council). They both acknowledge the principle of the sovereign equality of all Members of the Organization by the adoption of the rule, 'one State, one vote'. They also both apply to all decisions whatever their form. The result of the decision may be the adoption of a resolution or a motion on a matter of substance or of procedure. The adoption of a recommendation is, for this purpose, a decision. 'Decisions' within the meaning of both Articles (18 and 27) apparently also include elections, except, of course, where some other voting procedure is provided as in the case of the election of the members of the International Court.[1]

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[1] Article 10 of the Statute of the Court. In this case, an absolute majority of votes in the General Assembly and in the Security Council is required.

[2] Charter, Article 97.

[3] Article 22.

[4] Article 62.

[5] Article 96.

[6] Article 10. For an interesting study of the legal effect of resolutions of the General Assembly see Sloan, 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations', in this *Year Book*, 25 (1948), p. 1.

[7] For convenience of reference, the text of Article 27 is given below. It is as follows:

> '1. Each member of the Security Council shall have one vote.
>
> '2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.
>
> '3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.'

On the other hand, there are certain notable differences between the two Articles. In Article 18 a distinction is drawn between 'important questions' and 'other questions'. In Article 27 the distinction is between 'procedural matters' and 'other matters'. It might be thought, therefore, that procedural decisions relating to important questions in the General Assembly would be subject to the two-thirds rule. To escape from this conclusion it is necessary to place a construction on the words of Article 18 for which at first sight there appears to be no warrant. It seems to involve putting a different interpretation either on the word 'decisions' as used in Articles 18 and 27 or on the word 'questions' as used in paragraphs 2 and 3 of Article 18. In fact, however, the practice of the General Assembly has been to adopt procedural decisions by simple majority even when they relate to important questions. Thus Agenda items may normally be adopted, amended or deleted by a simple majority.[2] Indeed, there has sometimes been a tendency to stretch the meaning of 'procedure' in order to avoid the application of the two-thirds rule.[3] It has, for example, been maintained that a request to the International Court for an Advisory Opinion is a procedural matter requiring only a simple majority even though the substance would be an important question and subject to the two-thirds rule. Whether this extension of the meaning of 'procedure' is justified is open to doubt, but the practice of the General Assembly may be justified. Most, if not all, of the questions specifically mentioned in paragraph 2 of Article 18 are so described that they do not appear to include incidental questions of procedure. For example, the first 'important question' listed is 'recommendations with respect to the maintenance of international peace and security'. A decision to adjourn a debate, to establish a sub-committee or even not to vote on a draft resolution would not be a 'recommendation with respect to the maintenance of international peace and security'. Accordingly, it would not be a decision on an 'important question' within the meaning of Article 18 (2). This reasoning would apply equally to elections, suspension, and expulsion, but not so clearly to 'questions relating to the operation of the trusteeship system, and budgetary questions'. Nevertheless, taking the list as a whole it may be reasonably deduced that procedural questions were not intended to be treated as 'important questions' subject to the two-thirds rule. On this view, their exclusion depends on the interpretation not of the words 'decisions' or 'questions' but of the word 'important'. It follows that the distinction between procedural and other matters, which expressly applies only to voting in the Security Council, is also relevant to voting in the General Assembly.

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[1] See Article 10 of the Statute of the International Court of Justice.

[2] See Rules 21 and 22 of the Rules of Procedure of the General Assembly.

[3] At the 269th Plenary Meeting of the General Assembly, in 1949, the President ruled that a request for an Advisory Opinion of the International Court of Justice on the Question of South-West Africa was a procedural matter not subject to the two-thirds rule, even though resolutions concerning South-West Africa had previously been treated as 'important'. Although queried by the representative of the Union of South Africa, the President's ruling was not challenged and was applied. (See *Official Records* of the Fourth Session of the General Assembly, Plenary Meetings, pp. 536–7.) This case was distinguished from that of a proposal to request an Advisory Opinion on the question of Indians in the Union of South Africa, which was considered to require a two-thirds majority, because the latter was in the form of an amendment to a resolution which itself required a two-thirds majority. (See *Official Records* of the Second Part of the First Session of the General Assembly, Plenary Meetings, pp. 1048–61.)

Another difference between Articles 18 and 27 is that the former is weighted against the application of the two-thirds rule, while the latter is weighted in favour of the veto. Article 18 (2) defines the categories of questions to which the two-thirds rule shall apply, and Article 18 (3) leaves the residue of decisions on 'other questions' to be made by simple majority. Article 27 (2) specifies that decisions on procedural matters shall be made by an affirmative vote of seven members, and Article 27 (3) subjects the residue of decisions on 'all other matters' to the requirement of an affirmative vote of seven members including the concurring votes of the permanent members, i.e. the veto. In other words, in the General Assembly a case has to be made to show why the two-thirds rule applies; in the Security Council, on the other hand, if there is any room for doubt, a case has to be made to show why the veto does not apply.[1]

A third difference is that the General Assembly may by simple majority add to the categories of important questions which are governed by the two-thirds rule.[2] The Security Council is given no power by the Charter to alter the classification of its decisions into those on 'procedural matters' and those 'on other matters'. In fact, the General Assembly has not expressly used its power under paragraph 3 of Article 18 to add to the categories of questions in paragraph 2 of that Article, although when specific questions have been treated as important reference has sometimes been made to paragraph 3.[3] At the Ninth Session, however, the General Assembly adopted a special rule that decisions on questions relating to reports and petitions concerning the territory of South-West Africa should be regarded as important questions within the meaning of Article 18 (2).[1] The resolution did not cite paragraph 3 of Article 18 as its authority, but it can be construed as an exercise of the powers of the General Assembly under that paragraph. The basis of the resolution, according to the recitals in the preamble, was the Advisory Opinion of the International Court of Justice[2] and the desire to apply, as far as possible, the procedure followed by the Council of the League of Nations for the examination of reports and petitions relating to South-West Africa.[3]

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[1] This was, in effect, one of the main issues debated at the San Francisco Conference, see *supra*, p. 278.

[2] Article 18 (3).

[3] For example, at the 52nd Plenary Meeting, the representative of the Soviet Union, in the course of a debate as to the majority to be required for a resolution on the Treatment of Indians in the Union of South Africa, said, 'Accordingly, we propose that the Assembly take a vote on the following question: Does the Assembly consider it necessary, in conformity with paragraph

The General Assembly has also adopted a few rules of procedure which require a two-thirds majority. Probably the most important of these is Rule 83. This provides that when a proposal has been adopted or rejected it may not be reconsidered at the same session unless the General Assembly, by a two-thirds majority, so decides.[4] It is a moot point whether rules such as this determine additional categories under paragraph 3 of Article 18 or are made in the exercise of the power of the General Assembly to adopt its own rules of procedure under Article 21 of the Charter.

(*c*) *The mandatory character of Article 18*

Is the General Assembly bound to make decisions by a two-thirds majority or a simple majority of members present and voting as prescribed by Article 18 or is it free to adopt some other method of voting such as an absolute majority of all the Members of the United Nations? Article 18 is mandatory in form and appears to be exhaustive because it refers to 'decisions on important questions' and 'decisions on other questions'. It may, therefore, be reasonably argued that the General Assembly must make its decisions by one or other of the majorities specified in that Article and, of course, that decisions on the important questions listed in Article 18 (2) must be made by a two-thirds majority of the members present and voting.[5]

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(3) of Article 18, to call for a vote by a two-thirds majority?' The President refused to invoke paragraph 3 of Article 18 and put the question, 'Does the Assembly consider it necessary to apply the two-thirds majority rule to the decisions which will be taken on the question referred to in document A/205?' The answer was in the affirmative by 29 votes in favour, 24 against and 1 abstention. (See *Official Records* of the Second Part of the First Session of the General Assembly, Plenary Meetings, pp. 1059–60.)

[1] Resolution adopted by the General Assembly at its 494th Plenary Meeting on 11 October 1954.

[2] See *International Status of South-West Africa*, Advisory Opinion: *I.C.J. Reports*, 1950.

[3] See also *infra*, p. 286, n. 1, for further reference to the consideration at the Ninth Session of the General Assembly of the voting procedures to be applied to the examination of reports and petitions relating to South-West Africa.

[4] A rule in almost identical terms applies also to the committees of the General Assembly (Rule 124). See also Rules 15 and 19 of the Rules of Procedure of the General Assembly.

[5] The requirement of a two-thirds majority does not apply to committees of the General Assembly, where the simple majority rule normally applies.

It might be said, however, that it has not been the habit of the General Assembly to give such a strict and literal interpretation to the Charter. For example, Article 20 provides that special sessions of the General Assembly 'shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations'. As in Article 18, the mandatory word 'shall' is used. Yet at its Fifth Session, the Assembly provided that a special session should be held, in certain circumstances, on a request from the Security Council, 'on the vote of any seven members thereof', or on a request from a majority of the Members of the United Nations 'expressed by vote in the Interim Committee'.[1] These provisions may be justified on the ground that, while Article 20 requires a special session to be convoked at the request of the Security Council or of a majority of Members, it does not necessarily prohibit a special session from being convoked in ways other than those mentioned in that Article. By similar reasoning, it might be contended that Article 18 lays down the minimum majorities to be required and should not be construed as prohibiting the General Assembly from deciding to require larger majorities for decisions on certain questions. For example, the Assembly might provide that decisions on questions relating to human rights should be made by a majority vote of the Members of the United Nations.

Nevertheless, the general assumption underlying the practice of the Assembly has been against this possibility and in favour of the more natural interpretation of Article 18. The Assembly has, in its rules of procedure, adhered to the majorities provided by that Article except where, as in the case of the election of the members of the International Court of Justice, some other majority is prescribed. Accordingly, the better conclusion seems to be that decisions of the General Assembly in the exercise of its powers under the Charter must be by either a two-thirds or a simple majority of members present and voting.

This rule is subject to exception in those cases in which a different majority is prescribed by the Charter[2] or, perhaps, by some other instrument conferring powers on the Assembly. Thus, if several States were to agree to establish an international commission composed of the representatives of a number of States elected by the General Assembly by a vote of three-quarters of its members, the Assembly could exercise the authority conferred on it, but only in accordance with the terms of the agreement.

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[1] Resolution 377 A (V) and Rule 8 (*b*) of the General Assembly's Rules of Procedure. For further comment on this Resolution see this *Year Book*, 29 (1952), at p. 100.

[2] Article 108 requires a 'vote of two-thirds of the members of the General Assembly' for the adoption of amendments to the Charter, which are also subject to ratification. Under Article 109 (1) a General Conference for the purpose of reviewing the Charter may be held upon decision 'by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council'.

In these circumstances, if a candidate for the commission were supported by no more than a two-thirds majority of the members of the Assembly present and voting, he would not be elected. There would presumably be no valid decision of the Assembly. If, however, the substance of the agreement were a matter falling within the competence of the Assembly under the Charter, it is possible that a recommendation could be adopted by the appropriate majority under Article 18, but this would not be effective for the purposes of the agreement unless its provisions as to the vote required were satisfied. On the analogy of the Advisory Opinion given by the Permanent Court of International Justice concerning voting in the Council of the League of Nations,[1] it would seem, on the other hand, that the General Assembly could adopt a recommendation by a simple majority on a question with respect to the maintenance of peace and security concerning two States if provisions to that effect were made in an agreement between them, and this notwithstanding that the question would be an important one within the meaning of paragraph 2 of Article 18. It may be that, in those circumstances, the correct view would be that the General Assembly was exercising authority conferred not by the Charter but by the agreement. The possibility of additional powers being conferred on the General Assembly by agreements outside the Charter has already been recognized by the Assembly itself in exercising special functions for the disposal of the former Italian colonies under the Italian Peace Treaty.[2] Whether the powers of the General Assembly with respect to the Territory of South-West Africa were to be regarded as deriving from the Mandate or from the Charter,[3] was a question which had some bearing on the Advisory Opinion for which the International Court of Justice was asked as to the voting procedure to be followed by the Assembly in taking decisions on questions relating to reports and petitions concerning the Territory.[1]

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[1] *Interpretation of the Treaty of Lausanne: P.C.I.J.*, Series B, No. 12. See *supra*, p. 276.

[2] By paragraph 3 of Annex XI to the Treaty of Peace with Italy the Soviet Union, the United Kingdom, the United States and France agreed, in the events which happened, to accept the recommendation of the General Assembly on the disposal of the former Italian colonies and to take appropriate measures for giving effect to it. The Peace Treaty contained no stipulation as to the vote required in the General Assembly, but the Assembly, without any hesitation, applied the two-thirds rule. See *Official Records* of the Third Session of the General Assembly, Part II, Plenary Meetings, at p. 583.

[3] The Territory of South-West Africa was placed under the international Mandate assumed by the Union of South Africa in December 1920, in accordance with Article 22 of the Covenant of the League of Nations. On the demise of the League of Nations, the question arose whether the Union of South Africa was bound by the Charter to place the Territory under United Nations trusteeship and, if not, whether the obligations of the Mandate continued with the substitution of the United Nations for the League of Nations. In 1950, in response to a request from the General Assembly, the International Court gave an Advisory Opinion (*inter alia*) that the Union of South Africa was not obliged to place the Territory under trusteeship, that the 'Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted. . . .' This Opinion was accepted by the General Assembly (Resolution 449 A (V) of 13 December 1950), but not by the Union of South Africa. See *International Status of South-West Africa*, Advisory Opinion: *I.C.J. Reports*, 1950, p. 143.

(*d*) *The application of the two-thirds rule*[2]

Decisions of the General Assembly have usually been adopted by large majorities. Consequently, the issue whether the two-thirds rule should apply has not arisen as often as might have been expected, and the problems latent in paragraph 2 of Article 18 of the Charter have not always come to the surface. According to the terms of that paragraph, the two-thirds rule applies to 'important questions'. What then are 'important questions' within the meaning of Article 18? Obviously, they include all questions falling within any of the categories listed in paragraph 2 or added in accordance with paragraph 3 of the Article. That, however, is not the whole answer. Having regard to the language of Article 18 as a whole, it is necessary to consider four further questions:

(i) Is the list in Article 18 (2) exhaustive?
(ii) If not, what is meant by 'important' in the first sentence of Article 18 (2)?
(iii) What questions fall within the list?
(iv) How can a determination be made whether a question is 'important'?

(i) *Is the list in Article 18 (2) exhaustive?* If paragraph 2 of Article 18 stood alone, there is little doubt that the list of important questions would not be regarded as exhaustive. The form and language, at least of the English text, are against any other interpretation. The first sentence says, without qualification, that decisions on important questions shall be made by a two-thirds majority and the list is introduced by the words, 'These questions shall include'. The word 'include' raises a presumption that there may be important questions other than those expressly mentioned. If the drafters of the Charter had intended that the list should be exhaustive, they could have expressed their intention more easily and more clearly by omitting the first sentence of paragraph 2 and drafting the second sentence to read, 'Decisions of the General Assembly on the following questions shall be made by a two-thirds majority. . . .' The fact that they did not do so suggests that they did not intend the list to be exhaustive.

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[1] Under the Covenant of the League of Nations the rule of unanimity applied to decisions of the League Council on questions relating to reports and petitions concerning the Territory of South-West Africa. The General Assembly, during its Ninth Session, on 11 October 1954, adopted a special rule of procedure that decisions on such questions should be regarded as important within the meaning of Article 18 (2) of the Charter, i.e. should be subject to the two-thirds rule. During the debate in the Fourth Committee (see the summary record statements by the representatives of the Union of South Africa and Belgium and of Uruguay, the Philippines and Yugoslavia, in *Official Records* of the Ninth Session of the General Assembly, Fourth Committee, at p. 16, p. 80, p. 26, p. 27, and p. 33 respectively), it was contended that the General Assembly was not entitled to adopt this rule because it would extend the obligations of the Union of South Africa under the Mandates System and that it did not conform as far as possible to the procedure followed by the League Council. Accordingly, by a resolution adopted on 23 November 1954, the General Assembly requested the International Court of Justice to give an Advisory Opinion on the following questions:

> '(*a*) Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950:
>
> ' "Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations."?
>
> '(*b*) If this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South West Africa?'

[2] For an examination of the possible interpretations of paras. 2 and 3 of Article 18 see Kelsen, *The Law of the United Nations* (1950), pp. 180 ff.

Doubt is thrown on this conclusion by the language of paragraph 3, which provides that decisions on 'other questions' shall be made by simple majority. Does the word 'other' refer to 'important questions' in the first sentence or to the questions listed in the second sentence of paragraph 2? If it refers to the first sentence, the doubt does not arise. If, however, it refers to the second sentence, that is a strong indication that the list is exhaustive because it means that decisions on all questions other than those listed are subject to a simple majority vote unless they fall within a category added under paragraph 3. It can be argued that the provision for the determination of additional categories of questions by simple majority is itself an indication that until an addition is made there are no other categories of important questions than those expressly mentioned in paragraph 2. There is considerable force in these arguments, but they are not considered strong enough to upset the more natural interpretation of that paragraph.

If this conclusion is correct, it means that the General Assembly may treat a particular question as 'important' without adding a category under Article 18 (3), even though it is not included in the list in Article 18 (2). The practice of the General Assembly has not been either unambiguous or entirely consistent, but, on the whole, it seems to support this view. The reasons for the application of the two-thirds rule have not always been precisely stated, and in several cases it might be said that the resolution involved 'recommendations with respect to the maintenance of international peace and security'.[1] There are, however, cases in which the General

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[1] See, for example, Resolution 39(I), adopted by the General Assembly on 12 December 1946, on Relations of Members of the United Nations with Spain, and the corresponding paragraph which was not carried because it failed to secure a two-thirds majority at the 118th Plenary Meeting of the General Assembly on 17 November 1947 (*Official Records* of Second Session of the General Assembly, Plenary Meetings, vol. ii, pp. 1095–6). Other examples are the disposal of the former Italian Colonies and the Palestine problem, considered at several Sessions of the General Assembly. The remarks of the President made at the 218th Plenary Meeting are of interest. 'He laid stress on the fact that the question of the territories which had formerly belonged to Italy and had been detached from that country as a result of the Second

Assembly has regarded the particular question as 'important' and has applied the two-thirds rule to the particular decision. The practice of the Assembly is well illustrated by the history of voting on resolutions concerning information from non-self-governing territories under Chapter XI of the Charter. At its 64th Plenary Meeting, the General Assembly had before it a draft resolution on the subject of regional conferences of representatives of non-self-governing territories which referred to 'the importance of the declaration contained in Chapter XI of the Charter especially as it concerns the peace and security of the world'. The President, observing that those words actually occur in Article 18, proposed that the resolution should require a two-thirds majority. On a vote, it was decided that the two-thirds rule should apply.[1]

At the Second Session, a number of resolutions were adopted without any mention of the two-thirds rule;[2] but by a simple majority vote the Assembly decided to apply the two-thirds rule to the fifth resolution.[3] At the Third Session, although one representative mentioned the two-thirds rule, five resolutions under Chapter XI were adopted without further reference to the rule, but they were all in fact supported by majorities of more than two-thirds.[4] At the Fourth, Fifth and Sixth Sessions resolutions under Chapter XI were adopted without reference to the two-thirds rule, but in each case by a majority greater than two-thirds.[5] At the Seventh Session,

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World War was the most important of all those which had ever come before the General Assembly. It was clearly covered, therefore, by Article 18, paragraph 2, of the Charter and called for a decision by a two-thirds majority.' (*Official Records* of the Third Session of the General Assembly, Part II, Plenary Meetings, p. 583.) A further example is the Question of West Irian (West New Guinea) at the 509th Plenary Meeting, at the Ninth Session of the General Assembly, when the application of the two-thirds rule resulted in the rejection of the draft resolution submitted by the Fourth Committee (A/PV.509, at pp. 116–21).

[1] The vote was 25 in favour, 24 against, and 4 abstentions. See *Official Records* of the Second Part of the First Session of the General Assembly, Plenary Meetings, pp. 1355–6.

[2] *Official Records* of the Second Session of the General Assembly, Plenary Meetings, vol. i, pp. 709 ff.

[3] The representative of the United States maintained that the question was important because it involved the establishment on a permanent footing of a committee, with wide powers of recommendation and roughly corresponding to the Trusteeship Council in its composition. At his request, the President put to the vote the question of 'the application of the two-thirds majority rule'. This was adopted by 29 votes to 22 with 5 abstentions, but, in the event, the resolution was rejected by a simple majority. See *Official Records* of the Second Session of the General Assembly, Plenary Meetings, vol. i, at pp. 736–7 and 743–4.

[4] *Official Records* of the Third Session of the General Assembly, Part I, Plenary Meetings, statement by the representative of Denmark, at p. 381. See also pp. 393 ff.

[5] At the 361st Plenary Meeting, the representative of Denmark suggested that Article 18 (2) should apply to a draft resolution concerning factors which should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government. He said that it was an important question both in the general sense and, more particularly, in the sense of Article 18 of the Charter. The representative of Cuba said that the draft resolution was concerned only with future procedure and not with the substance of the question. This comment was apparently accepted by the General Assembly, because the vote was taken without further mention of the two-thirds rule. See *Official Records* of the Sixth Session of the General Assembly, Plenary Meetings, p. 355.

several resolutions under Chapter XI were again adopted without reference to the two-thirds rule, but it was applied, on the President's ruling, to a resolution on factors to be taken into account in deciding whether a territory is a territory whose people have not yet attained a full measure of self-government.[1] The issue of the application of the two-thirds rule to resolutions under Chapter XI was brought to a climax by a statement made by the representative of Mexico during the Eighth Session.[2] He argued that the real intention of Article 18 was to distinguish not between 'important questions' and 'other questions', but between decisions which require a two-thirds majority and decisions which require only a simple majority. In his opinion, paragraph 2 of Article 18 specifies all the categories of questions to which the two-thirds rule applies and 'until the General Assembly has determined additional categories, there is nothing in the Charter automatically authorizing decisions on other questions by a two-thirds majority'. He requested that any questions relating to non-self-governing territories might always be decided by a simple majority.[3] The General Assembly decided that a simple majority would be sufficient, but it was expressly stated by the President, without dissent, that the decision only related to the seven draft resolutions then before the Assembly.[4] This decision leaves the door open for particular resolutions under Chapter XI in the future, as they have been in the past, to be made subject to the two-thirds rule.

Apart from resolutions under Chapter XI, there are other instances in which the General Assembly has decided to require a two-thirds majority. This has been the practice for resolutions concerning South-West Africa,[1] even before the adoption of the special rule at the Ninth Session of the Assembly.[2] After a thorough debate, during the First Session, the Assembly decided to apply the two-thirds rule to the question of the treatment of Indians in the Union of South Africa[3] and this precedent has been followed at later sessions. The two-thirds rule was also applied to the question of race conflict in South Africa[4] and the draft convention on the political rights of women[5] at the Seventh Session.

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[1] The President's ruling was made at the request of the representative of Denmark and was not challenged. The resolution was in fact adopted by a majority greater than two-thirds. See *Official Records* of the Seventh Session of the General Assembly, Plenary Meetings, pp. 348 and 355.

[2] He quoted in support a passage from Kelsen, op. cit., pp. 180–1.

[3] *Official Records* of the Eighth Session of the General Assembly, Plenary Meetings, pp. 305–8. The view of the representative of Mexico was opposed by the representative of Denmark (ibid., p. 308). After the vote on the Mexican motion, the representative of the United Kingdom criticized the 'strange theory that is being put to us by the representative of Mexico'. Quoting Article 18 of the Charter, he said: 'All important matters should therefore be decided by a two-thirds majority. . . . In a sense, the question is: does the word "important" mean "important" or does it not? Obviously from an ordinary reading of the Charter, since it is said specifically that important matters must be decided by a two-thirds majority, the word "other" can only relate to unimportant questions. . . . Under the terms of paragraph 3 of Article 18 it is in fact possible—and it has just demonstrated that it is possible—for the General Assembly to decide, in its wisdom, by a simply majority that any matter, no matter how important, is not really important but only one of the "other" questions under the Charter.' He then added: 'Instead of deciding under paragraph 3 of Article 18, as it is empowered to do, that an additional category of questions should be decided by a two-thirds majority, the General Assembly was asked, in the contrary sense, to decide—and is now asked, as I understand it, to decide—that an additional category—in this case of questions relating to Chapter XI—should be decided by a simple majority, which is absolutely the reverse of what the Charter evidently intended' (ibid., pp. 313–14). The representative of Yugoslavia maintained, on the basis of the French text, that because it is introduced by the words, 'sont considérées comme questions importantes', the enumeration in Article 18 (2) is exhaustive (ibid., p. 317).

[4] *Official Records* of the Eighth Session of the General Assembly, Plenary Meetings, p. 323.

(ii) *What is meant by 'important' in the first sentence of Article 18* (2)*?* If the list of important questions in paragraph 2 of Article 18 is not exhaustive, the word 'important' in the first sentence of the paragraph must have a positive content in addition to that which is given to it by the list. The Charter, however, gives little guidance as to what that content should be. No precise meaning can be given to the word 'important'. As the representative of India said at the First Session of the General Assembly, 'Every question that the Assembly discusses is important'.[6] Nevertheless, some questions are of greater importance than others, and it appears to have been the intention that, if a question is of intrinsic importance and not a comparatively insignificant matter, a two-thirds majority should be required. It might be thought that some guidance as to the meaning of 'important questions' could be gleaned from the list in Article 18 (2), but the list is so diverse that it does not indicate any general class of questions which should be regarded as important. Even the process of argument by analogy is not very helpful. Thus, for example, the list includes the election of members of the three Councils, but does not include the appointment of the Secretary-General.[7] There can be no doubt about the importance, in the ordinary sense, of his appointment. Yet a simple majority in the General Assembly is presumably sufficient in this case. Again, the list includes 'the admission of new Members to the United Nations', but it would seem that this applies only to the actual admission of States and not to recommendations on the general subject of the admission of new Members.[1]

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[1] At the 269th Plenary Meeting, the President ruled that the question of South-West Africa having in the past been considered by the General Assembly to require a decision by a two-thirds majority vote, a two-thirds majority vote would be necessary for the draft resolution on that question. See *Official Records* of the Fourth Session of the General Assembly, Plenary Meetings, p. 535.

[2] See *supra*, pp. 282-3.

[3] *Official Records* of the Second Part of the First Session of the General Assembly, Plenary Meetings, p. 1048. This is the most thorough consideration by the General Assembly of the interpretation of Article 18. See also references to the debate in Kelsen, op. cit., at pp. 181 ff.

[4] *Official Records* of the Seventh Session of the General Assembly, Plenary Meetings, pp. 333-4.

[5] Ibid., p. 449. The President said: 'In reply to the request that has just been made, I would rule that this draft resolution and the draft convention attached to it constitute a question of importance under rule 84 of the rules of procedure and therefore require a two-thirds majority.' There was no objection and the two-thirds rule was applied.

[6] *Official Records* of the Second Part of the First Session of the General Assembly, Plenary Meetings, at p. 1050.

[7] Article 97.

One can only conclude that the drafting of Article 18 is unsatisfactory. No attempt has been made in the Rules of Procedure of the General Assembly to clarify the meaning of 'important questions'. The three paragraphs of the Article have simply been reproduced as Rules 84, 85 and 87.[2] Consequently, it is, in the last resort, a matter for the General Assembly to decide in each case by a simple majority whether the two-thirds rule shall apply. This leads to the paradox that the more importance members attach to a question and the more anxious they are to secure the adoption of a resolution on it, the more likely they are to vote against the application of the two-thirds rule and, for the purpose of voting, to maintain that the question is not an important one. In any case of doubt, the members of the Assembly can, if they constitute a majority, use their votes first to ensure that the two-thirds rule is not applied and then to secure the adoption of the resolution itself by simple majority.

(iii) *What questions fall within the list in Article 18* (*2*)*?* Most of the categories of questions listed in Article 18 (2) are quite specific and give rise to no difficulties of interpretation. There are only three general headings. They are 'recommendations with respect to the maintenance of international peace and security', 'questions relating to the operation of the trusteeship system' and 'budgetary questions'. The first is open to a variety of interpretations. As Kelsen observes, 'The phrase . . . may mean all the recommendations which the General Assembly is authorised to make, since they all serve, directly, or indirectly, the maintenance of international peace and security, which is the purpose of the Organisation. However, a more restricted interpretation is not excluded.'[3] It could mean only recommendations relating to the maintenance of peace and security under Article 11 (2). The practice of the General Assembly does not give much indication as to the proper meaning of this phrase, which probably lies somewhere between these two extremes. The second of the three headings requires no comment, but problems have arisen with respect to 'budgetary questions'. Many resolutions of the General Assembly, on questions which are not themselves treated as 'important', involve expenditure and, therefore, have budgetary implications. Nevertheless, the General Assembly has usually applied the simple majority rule to the adoption of such resolutions and left the required appropriation to be approved as part of the budget which, of course, is subject to the two-thirds rule. In fact, the result is that the appropriation is not itself made subject to the two-thirds rule. The budget is submitted to the General Assembly under general headings. Accordingly, it is not possible to require a separate vote on a particular appropriation as part of a proposal because it is included in the total for the relevant heading. Advantage cannot be taken of Rule 86, which makes the two-thirds rule applicable to a vote on a part of a proposal. Consequently, the two-thirds rule does not in practice operate as an obstacle to the adoption of appropriations for particular matters. It is only an instrument for controlling the overall expenditure of the Organization. A reduction of the amount under any heading can be proposed by way of amendment in the General Assembly, but the amendment would then require a two-thirds majority for its adoption in accordance with Rule 86.

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[1] At the 318th Plenary Meeting on 4 December 1950 parts of a draft resolution on the subject of the admission of new Members were declared adopted even though they were supported only by a simple majority. The resolution as a whole, however, was rejected by 19 votes to 13 with 19 abstentions. See *Official Records* of the Fifth Session of the General Assembly, Plenary Meetings, pp. 587–8.

[2] The only clarification is contained in Rule 86, which provides that decisions of the General Assembly on amendments to proposals relating to important questions and on parts of such proposals put to the vote separately shall be made by a two-thirds majority of the members present and voting. Rule 86 was added by Resolution 475(V), adopted by the General Assembly on 1 November 1950. Before this addition to the Rules of Procedure, the practice of the General Assembly in the application of the two-thirds rule to parts of, and amendments to, proposals had been irregular.

[3] Op. cit., p. 186.

(iv) *How can a determination be made whether a question is important?* Whether a proposal should be treated as an 'important question' is, as has been stated above, subject to a decision by the General Assembly by a simple majority. This decision may, however, be the result of two distinct procedures. It is open to any member to move that a proposal shall be treated as an important question for the purposes of voting. In these circumstances, the motion requires a simple majority for its adoption. It is also open to the President to rule that a particular proposal should or should not be treated as an important question. This follows from the powers conferred on him by Rule 35, which include the power to announce decisions and to rule on points of order. In practice, the ruling of the President has considerable influence, but it can be overruled by a simple majority.[1] Apart from the moral weight of a President's ruling it should be noted that, whereas a motion requires a simple majority for its adoption, a President's ruling that a proposal should be treated as an important question requires a simple majority to be overruled. Therefore, even technically, the distinction between a President's ruling that a matter should be treated as important and a motion to the same effect is of some significance. If opinion in the General Assembly is evenly divided, the distinction may be decisive.

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[1] Under Rule 73 a representative may appeal against the ruling of the President but the President's ruling shall stand unless overruled by a majority of the members present and voting.

(*e*) *Elections*

All elections are held by secret ballot. As a general rule, there are no nominations.[1] The absence of nominations does not prevent canvassing, but this has to be done privately. Speeches in support of candidates are out of order in the General Assembly. One practical effect of the rule is that it may enable the resolution of a deadlock by the election of a candidate not previously named which would not be possible if nominations had been made and were closed.

The process of election is often protracted because the number of candidates obtaining the required majority on the first and succeeding ballots is less than the number of vacancies to be filled. In theory, the process could continue indefinitely and, in practice, it is sometimes impossible to reach a final result at one meeting. During the Sixth Session of the General Assembly, twenty ballots, which took place at three plenary meetings, were required to elect three non-permanent members of the Security Council.[2]

The normal method of voting is by writing the names of the appropriate number of candidates on a ballot paper. If more names are written on the paper than there are vacancies to be filled, or if the voting is limited to certain candidates and the names of others are written, the ballot will be invalidated. There may be other circumstances in which a ballot is to be regarded as invalid, but they are not stated in the Rules of Procedure and the decision as to the validity of any ballot is left to the tellers and the President.[3] It has been established, however, that a ballot is not invalidated merely because it contains fewer names than the number of vacancies.[4] This point is of some importance because, whenever the majority required for election is a proportion of the members present and voting,[5] the number of votes necessary is calculated on the basis of the number of valid votes cast[1]—not on the total number of ballots, valid and invalid. Therefore, a group of representatives may, by voting only for their favoured candidate and not for any others, increase his chances of success without helping any other candidate to obtain the required majority. If the group is sufficiently large, it may be able to prevent any other candidate from being elected until its own has been successful.[2]

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[1] The procedure for elections by the General Assembly is governed by Rules 94, 95 and 96 of its Rules of Procedure which apply except where another procedure is expressly provided. In the case of the International Law Commission provision for nominations is made in Article 3 of its Statute. Provision for nominations is also made in Articles 4–7 of the Statute of the International Court of Justice.

[2] There were 8, 7 and 4 ballots at the 349th, 353rd and 356th Plenary Meetings, respectively. See *Official Records* of the Sixth Session of the General Assembly, Plenary Meetings, at pp. 203–5, 235–6, and 281.

[3] *Official Records* of the First Part of the First Session of the General Assembly, Plenary Meetings, pp. 97–98.

[4] Ibid., pp. 81–82.

[5] The rule is different, for example, in the case of the election of members of the International Court of Justice. By Article 10 of the Statute an absolute majority of votes in the General Assembly (and in the Security Council) is required. Therefore, if 60 members of the General Assembly and 4 non-member States take part in the election, the required majority is 33 votes. In this case, neither abstentions nor invalid ballots make any difference to the number of votes required. See, for example, *Official Records* of the Ninth Session of the General Assembly, Plenary Meetings, p. 241.

(*f*) *The validity of a vote*

It is apparent that a ballot cast by a representative may, for various reasons, be invalid. Whether a vote cast on a motion or resolution can be invalid is a different question. This is so because different considerations are involved. A ballot is rendered invalid by mechanical defects which appear on the face of the paper. Normally, there is no question of a vote being invalid for mechanical reasons. If voting is by show of hands, the number of hands raised is counted, the result is announced, and that is the end of the matter.[3] Likewise, if the vote is by roll-call, each representative answers 'Yes', 'No', or 'Abstention'. If there is any doubt about an answer it is clarified immediately. The only other possibilities are that a representative may refrain from participation in the vote or his vote may be incorrectly recorded. If he fails to vote in accordance with the appropriate procedure, he will probably be regarded as not having participated

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[1] If it appears that a ballot paper is intended to be an abstention, the ballot will be valid, but it will not count towards the number of valid votes.

[2] Suppose, for example, that there are 3 vacancies to be filled, that there are 4 candidates, *A*, *B*, *C*, and *D*, and that the required majority is two-thirds of the members present and voting. Twenty-one States wish to ensure that *A* is elected and vote for *A* only. Of the remaining States, 15 vote for *A*, *B*, and *D*, 4 vote for *A*, *B*, and *C*, and 20 vote for *B*, *C*, and *D*. The result of the ballot would be announced by the President as follows:

Number of ballot papers:	60
Invalid ballots:	0
Number of valid ballots:	60
Abstentions:	0
Number of valid votes cast:	60
Required majority:	40
Number of votes obtained:	
A	40
B	39
D	35
C	24

A, having obtained the required two-thirds majority of the members present and voting, was elected.

[3] See Rule 89 of the Rules of Procedure of the General Assembly, and, for committees of the General Assembly, Rule 128. Unless a vote by roll-call is requested, a vote is normally by show of hands, but it may be by standing. Errors in the count can and do occur. Various solutions to this problem have been suggested, including the installation of voting machines which would ensure accuracy and save time, but no acceptable solution has been found. Occasionally, where there has been serious doubt as to the accuracy of a count, the vote has been retaken, but this is not a very satisfactory solution.

in the vote and his action will be ignored for the purpose of determining the result.

Nevertheless, the question may arise whether a vote, which has been cast in accordance with the rules of procedure, can be rendered invalid by reason of the grounds on which it is cast. This has never been put to the test in the General Assembly, but the question has for several years been in the minds of delegates in connexion with the problem of the admission of new Members to the United Nations. In 1948, the General Assembly requested the International Court for an Advisory Opinion on two questions.[1] The Opinion of the Court on the first question was to the effect that neither in the Security Council nor in the General Assembly is a member juridically entitled to make its consent to the admission of a State to membership in the United Nations dependent on conditions not expressly provided by paragraph 1 of Article 4 of the Charter. In response to the second question the Court expressed the Opinion 'That, in particular, a Member of the Organization cannot, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State.'[2]

In seeking the Opinion of the Court, the General Assembly was concerned with the rejection of applications for admission by the Security Council as a result of the negative vote of one of the permanent members. The Opinion, however, is not limited to the votes of permanent members of the Security Council, but extends to all members both in the Security Council and in the General Assembly. Likewise, although the Opinion refers only to applications for admission to the United Nations, there is no apparent reason why it should not be of wider application. The underlying principle is that a Member is not 'juridically entitled' to do any act which is in breach of its obligations under the provisions of the Charter.[3]

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[1] The questions were as follows:

> 'Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?'

Conditions of Admission of a State to Membership in the United Nations (*Article 4 of the Charter*), Advisory Opinion of 28 May 1948; *I.C.J. Reports*, 1948, p. 58.

[2] Ibid., p. 65.

[3] The Opinion of the Court was adopted by 9 votes to 6. The joint dissenting Opinion of Judges Basdevant, Winiarski, McNair and Read is of particular interest. They expressed the view: 'A Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State which possesses the qualifications specified in paragraph 1 of that

It does not necessarily follow that a vote cast in the circumstances contemplated in the Advisory Opinion would be invalid. At first sight, it might appear that the Court meant that, in the particular case, a Member cannot validly cast a vote in a certain sense, but that is not what the Court said. As is clear from the Opinion of the Court read as a whole, it was directed to the right to impose 'an additional condition', and not to the validity of the vote itself.[1] Even if the Opinion were read as relating to the vote itself, it would not necessarily imply that a vote could or should be regarded as invalid. It might be illegal to cast a vote in a certain sense or on certain conditions, but the vote itself might not thereby be rendered void. The possibility of a vote being regarded as void by reason of the grounds on which it is cast cannot be discounted entirely, but in practice it has never been so regarded. Even in the Security Council, where the negative vote of a permanent member has been cast on grounds which appear to fall within the terms of the Advisory Opinion, the vote has been treated as valid and effective to prevent the adoption of a resolution which had received seven affirmative votes.[2] The General Assembly has, by implication, accepted this position[3] and has not put to the International Court any question as to whether a vote can be rendered void if cast on grounds which are illegal. If the question were put, it should be answered in the negative. The weight of both theoretical and practical considerations is against an affirmative answer. A vote is a means whereby a State, through its representative, exercises its will on a particular matter. The motives may be bad or 'illegal', but that should not render void the act whereby the will is expressed. There would be no sense in voting on a proposal unless a valid vote could be cast either for or against it. The proposal might itself be regarded as contrary to the Charter; it might even be *ultra vires*; but the votes for and against it would still be valid. From the practical point of view, it is difficult to see who should have the power to decide that a vote was void. The power would not be one that could safely be left in the hands

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Article, is participating in a political decision and is therefore legally entitled to make its consent to the admission dependent on any political considerations which seem to it to be relevant.' (At p. 92.) But they added (at p. 93): 'Nevertheless, . . . a Member of the United Nations does not enjoy unlimited freedom in the choice of the political considerations that may induce it to refuse or postpone its vote in favour of the admission of a State to membership in the United Nations. It must use its power in good faith, in accordance with the Purposes and Principles of the Organization and in such a manner as not to involve any breach of the Charter.'

[1] In fact, in the circumstances contemplated, the vote cast would in all probability be a negative vote. If an affirmative vote were cast subject to 'an additional condition', a logical conclusion from the Advisory Opinion would be that the condition would be invalid, but, if so, this would make the vote itself valid.

[2] See, for example, the vote on the application of Italy for admission to the United Nations at the 206th Meeting of the Security Council on 1 October 1947 (Security Council, *Official Records*, Second Year, pp. 2476–7).

[3] See Report of the Special Committee on Admission of New Members, U.N. Doc. A/2400 of 25 June 1953.

of the President, for its exercise would be too delicate and too difficult a task. If the General Assembly had the power, it might lead to the somewhat absurd result that a majority which had carried a resolution could declare void the votes cast by the minority and thus give the resolution the apparent authority of unanimity. The right conclusion seems to be that voting in the General Assembly, as elsewhere, is an act which once done in the proper manner by an authorized person is effective and cannot be rendered invalid by an extraneous cause.

(*g*) *Correction and reconsideration of votes*

The question of corrections of vote is of current interest because it is now the subject of study by the Secretary-General of the United Nations in accordance with a resolution adopted by the General Assembly during its Ninth Session.[1] This, like many other questions related to voting procedure, is not covered by the Rules of Procedure of the General Assembly. A representative may wish to correct his vote either before or after the announcement of the result. In the former case, there does not seem to be any serious objection to a correction being made and being taken into account for the purpose of determining the result of the voting. In the latter case, more serious considerations arise. A representative may have various reasons for wishing to correct his vote. For example, he may by inadvertence have voted contrary to his instructions; he may have misunderstood the question put; or his vote may have had an effect which he did not anticipate. Some reasons may have more merit than others, but it is believed that as a general rule the result of voting cannot properly be altered by the wish of a representative to change his vote after it has been announced. Upon the announcement of the result, the decision becomes that of the General Assembly or, as the case may be, of the committee concerned. Once the decision has been made it can only properly be altered by a new decision. The practice of the General Assembly and its committees has not been uniform in this regard, but usually a representative wishing to correct his vote has not been allowed to do more than make a statement for the record.

The governing rule is that when a proposal has been adopted or rejected, it may not be reconsidered at the same Session unless the General Assembly, by a two-thirds majority, so decides.[2] If a representative wishes to alter his vote, it is always open to him to move for reconsideration under this rule. Once a proposal has been adopted or rejected he should not be able to alter the result by his unilateral act, but if he were free to correct his vote this might be the effect. A single vote is sometimes decisive, and the reversal of one vote may mean the reversal of the result.

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[1] Resolution adopted by the General Assembly on 14 December 1954.

[2] Rule 83 of the General Assembly's Rules of Procedure: the corresponding provision for committees of the General Assembly is in Rule 124.

The General Assembly has shown a natural reluctance to reconsider proposals and the requirement of a two-thirds majority has usually been an effective barrier. That, however, has not always been so. It has been found possible to avoid the application of the rule by regarding a proposal as new and different from one that has previously been accepted or rejected. It has also been regarded as legitimate to take a second vote if the first has been based upon a formulation of the proposal which has misled the General Assembly or the committee as to its real intent. In these circumstances, it may be said that the proposal is not in reality being reconsidered, because it has not in truth been put to the vote. But, once more, practice has not been uniform and there is room for clarification.

PERSONAL IMMUNITIES OF DIPLOMATIC AGENTS

By A. B. LYONS, M.A., LL.B.

IN a previous article[1] an examination was made of the rules governing the principal immunities, other than jurisdictional, which are generally accorded to the property of diplomatic agents. The present study is an examination of certain other immunities, which may be called personal immunities, accorded to diplomats, with a view, on the one hand, to establishing their content and, on the other, to test their justification. The topics which will be examined are:

1. the so-called right of personal inviolability;
2. freedom from taxation, including customs, purchase tax, death duties, &c.;
3. freedom of movement;
4. freedom of communications.

I. *Personal inviolability*

Many writers have devoted considerable attention to the right of a diplomatic envoy to personal inviolability, although occasionally they do not clearly distinguish between true personal inviolability and mere freedom from arrest and trial, which is really no more than immunity from the jurisdiction of the courts of the receiving State. Bynkershoek,[2] for example, has a chapter headed 'Concerning the Inviolability of Ambassadors and whether it or anything else affords them immunity from legal process', in which he deals only incidentally with punishments for assaults on ambassadors. Of modern writers,[3] who use the term 'inviolability' in its stricter meaning, Satow,[4] the author of the standard *vade mecum* in the English language for diplomatic persons, states that the expression implies a higher degree of protection to the person of the diplomatic agent and his belongings than is afforded to a private individual. It is, he adds, the duty of the Government to which they are accredited to take all necessary measures to safeguard the inviolability of diplomatic agents and to protect them from any act of violence or insult. One may ask whether this does not in some measure define the duty of Governments towards all aliens,[1] if not, indeed, all persons, within their jurisdiction. Satow quotes the case of *Frend et Al.* v. *United States*,[2] in which the Court of Appeals of the District of Columbia upheld a conviction for an offence against a Congressional Resolution[3] prohibiting the display near an embassy of flags, banners, &c., 'to intimidate, coerce, harass, or bring into public disrepute . . . any diplomatic or consular representatives'; but where, as in the United Kingdom, there is no such law,[4] 'the ordinary procedure of the penal law should be employed'. Satow makes it clear that if an envoy is injured or insulted, 'the offended state has no ground for reclaiming a departure from the ordinary process of justice and should be satisfied even if the accused be acquitted or punished by the infliction of a lesser penalty than that state might have deemed just[5] provided that the law provides a proper means of punishment and that the trial is properly conducted'.[6] In the ultimate, it will be seen, Satow reduces his 'higher degree of protection than is afforded to a private person' to something of very small compass. 'Inviolability' has also been treated by so eminent an authority as Phillimore as exemption from the criminal tribunals of the State to which the envoy is accredited so that he is entitled to exemption from all criminal proceedings and freedom from arrest and civil process,[7] a conception very different from that of the generality of writers, who for the most part use the term inviolability to mean a great deal more. For example, the rights of inviolability, it has been said, 'so impart a character of peculiar gravity to offences committed against [an envoy's] person that they are looked upon by the State to which he is accredited as equivalent to crimes committed against itself'.[8] The implications of such a rule would be far-reaching and, it may be observed, might lead to strange results. It draws no distinction, for example, between an organized attack, for political reasons, on an envoy and a casual assault by an individual unaware of the identity of his victim.[1] The two versions of the meaning of 'inviolability' are contained in one sentence which has been repeated in successive editions of *Oppenheim*, where it is said of diplomatic envoys that they are 'just as sacrosanct as heads of States. They must, therefore, be afforded special protection as regards the safety of their persons'—which is one thing—'and be exempted from every kind of criminal jurisdiction by the receiving States'—which is quite another. This authority adds: 'The protection due to diplomatic envoys must find its expression not only in the necessary police measures for the prevention of offences, but also in specially severe punishments for offenders',[2] and quotes Stephen[3] for the rule of English criminal law that to violate by force or personal restraint any diplomatic privilege conferred upon the diplomatic representatives of foreign countries constitutes a misdemeanour, but he cannot cite any 'specially severe punishment for offenders'. In support are quoted the provisions of the Statute of Anne, section 4 of which provides for the punishment of attorneys who seek to enforce process against diplomatic envoys—they shall be deemed 'violators of the laws of nations and disturbers of the publick peace' and 'shall suffer such pains, penalties, and corporal punishment, as the . . . Lord Chancellor, Lord Keeper and the . . . Chief Justices, or any two of them, shall judge fit to be imposed and inflicted'. Regarded as a penal provision, this section is less effective than at first sight appears. The Statute, as is well known, has a rather special history;[4] it was passed in order to placate the Emperor of Russia after Matueof, his Ambassador, had been arrested for debt, and judicial dicta[5] suggest that its punitive provisions have largely become a dead letter and were perhaps not meant to be taken seriously. In this regard, it is pertinent to quote the words of the late Professor Kenny: '. . . the Statute . . . did not make it possible to punish this offence with death: though its framers may have hoped that "his Czarish Majesty" whom they avowedly were attempting to appease, would be unaware that its language would be construed thus restrictively'.[6] Certainly, it is not recorded that any attorney has ever been corporally punished under section 4 for issuing a writ against an ambassador.

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[1] See this *Year Book*, 30 (1953), pp. 116–51.

[2] *De Foro Legatorum* (1744) (trans. by Laing, 1946), cap. v.

[3] Cf. Déak, 'Classification des immunités et privilèges des agents diplomatiques', in *Revue de droit international et de législation comparée*, 9 (1928), p. 189, who heads his list of immunities with 'inviolability of the person'. Most authors of draft 'codes' of international law emphasize personal inviolability, e.g. Bluntschli, *Le Droit international codifié* (1878), p. 191 (cited in *American Journal of International Law*, 26 (1932), pp. 144–53). *The Report of the League of Nations Committee of Experts for the Progressive Codification of International Law* (Questionnaire No. 3 on Diplomatic Immunities), C.196.M.70.1927. V, pp. 78 ff. (see also *A.J.* 20 (1926), Special Suppl., pp. 148–75), includes in its plan or analysis of immunities the inviolability attaching to diplomatic persons. The *Washington Project for the Codification of American International Law* (American Institute of International Law, 1925) provides (§ 19) that 'Diplomatic Agents shall enjoy inviolability as to their person' (see *A.J.* 20 (1926), Special Suppl.); and the Convention on Diplomatic Officials adopted at Havana on 20 February 1948 provides (Article 14) that 'Diplomatic officers shall be inviolate [*sic*] as to their persons . . .': see Hudson, *International Legislation*, vol. iv (1931), pp. 2385, 2390.

[4] *Guide to Diplomatic Practice* (3rd ed. by Ritchie, 1932), §§ 312–17.

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[1] See Oppenheim, *International Law*, vol. i (8th ed. by Lauterpacht, 1955), § 320.

[2] (1938), 100 F. (2d) 691; *Annual Digest and Reports of Public International Law Cases*, 1938–1940, Case No. 161.

[3] 52 Stat. 30, 22 U.S.C.A. §§ 255*a*, 255*b*. (Briggs, *The Law of Nations* (2nd ed., 1953), p. 766, cites an American Law, 18 U.S.C.A. § 112, 1545, which makes it an offence to assault public ministers.)

[4] The Statute of 7 Anne, c. 12, s. 5, does no more than protect ambassadors and their servants against writs and process of execution. See *infra*, p. 301.

[5] Citing Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten* (1872), § 467.

[6] Cf. Oppenheim, op. cit., vol. i, § 165*a*: '. . . criminal offences against aliens . . . and especially against . . . diplomatic representatives of foreign States, must be punished according to the ordinary law of the land, . . .'

[7] See Phillimore, *Commentaries on International Law* (1855), vol. ii, §§ 153–75.

[8] Hall, *International Law* (8th ed., 1924), § 98*.

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[1] Moreover, the form in which the rule is cast fails to accord with the traditional attitude of States when ambassadors have been attacked: it is the sending States who have treated such incidents as offences against themselves.

[2] *International Law*, vol. i (8th ed. by Lauterpacht, 1955), § 386.

[3] *Digest of Criminal Law*, § 117 (see *infra*).

[4] Set out fully in Hurst, *International Law: Collected Papers* (1950), pp. 191–2, quoting from Martens, *Causes célèbres* (1827), vol. i, pp. 47–74. See also *Triquet* v. *Bath* (1764), 3 Burr. 1478.

[5] Cf. the dicta of Slesser L.J. in *The Amazone*, [1940] P. 40 at p. 44.

[6] *Outlines of Criminal Law* (13th ed., 1933), p. 94.

The fact of the matter would appear to be that so far as English law is concerned, assaulting a foreign ambassador, if it ever was a separate crime, has ceased to be one. The conception has become an archaism, and the most recent writers know nothing of it. True it is that Stephen's *Digest of Criminal Law*[1] still repeats from earlier editions its Article 117, 'Violation of Ambassador's Privileges':

> 'Everyone is guilty of a misdemeanour who, by force or personal restraint, violates any privilege conferred upon diplomatic representatives of foreign countries by the law of nations, as collected by His Majesty's Courts from the practice of different nations, and the authority of writers thereon.'

But *Russell on Crime*[2] says bluntly of the Statute of Anne: 'there is no recorded case of a prosecution of or a breach of this Act', and observations in the current edition of *Kenny*[3] are confined to the 'remarkable peculiarities of procedure' of the Statute. *Archbold*,[4] again, does not so much as mention the Statute; tacked on to a cautious note concerning libel of foreign sovereigns is a reference to *R.* v. *D'Eon*,[5] and that is all.

The most comprehensive treatment of the topic of inviolability is that of Genet,[6] who devotes an entire chapter to 'Inviolabilité et indépendance des Agents diplomatiques' in which he puts forward extensive arguments and numerous examples of the special criminality of those who attack the person of foreign diplomatic envoys. He quotes Vattel, Montesquieu and other writers, and bases the rule of inviolability on 'une convention tacite des gouvernements civilisés'. He cites a number of instances of violations of the rule which have been punished, including the case just mentioned of the arrest of the Russian Ambassador in London. He adds:

> 'On voi par ces exemples combien est solidement implanté au cœur des Nations le sentiment de l'inviolabilité diplomatique et combien rares sont les exemples où un pays, un souverain, ne se sont pas fait un point d'honneur de témoigner immédiatement à la victime, à ses compatriotes, à sa gouvernement, toute l'affliction que leur causait l'offense fait à leur représentant. Ce respect n'est d'ailleurs pas que gravé dans les cœurs; il est écrit dans les textes.'

He cites as example a Netherlands Law of 1651.[7] He admits, however, that the French Penal Code contains no provisions expressly protecting foreign diplomatic agents. Article 84 of the Penal Code provides for the punishment of 'whoever by hostile actions not approved by the government exposes the state to a declaration of war', and Article 86: 'whoever . . . exposes France to the risk of reprisals'. Genet concedes that these provisions are both very wide and very imprecise. French law is indeed really more to the point when it deals with attacks on the reputation of diplomatic agents by defamatory writings[1] and the like; there is, for example, the Law of 29 July 1881[2] regarding the liberty of the Press, which provides for the punishment of any 'outrage commis publiquement envers les ambassadeurs'.[3] The Codes of a number of other countries contain cognate provisions. The German Penal Code of 1871, for example, mentions 'any offence against a foreign minister'.[4] The Belgian Law of 12 March 1858 provides a penalty for acts, words, gestures, menaces uttered against diplomatic agents 'outragés à raison de leur fonction'; with higher penalties if the agent is a head of mission (and higher penalties still if 'il y a une effusion de sang'). Provisions more or less similar exist in the Codes of Austria, Italy, Holland, Russia, Sweden and Switzerland.[5]

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[1] See now 9th ed. (1950). In support of Article 117 is cited *Triquet* v. *Bath* (1764), 3 Curr 1478, which seems very little in point. Article 118 quotes from s. 3 of the Statute of Anne prohibiting the issue of process against foreign ministers, and Article 119 solemnly sets out the pains and penalties prescribed in s. 4 of the Statute.

[2] 10th ed. (1950), vol. i, chap. 8: 'Violation of Diplomatic Privileges', p. 126.

[3] *Outlines of Criminal Law* (ed. by Turner, 1952), § 482.

[4] *Pleading, Evidence, and Practice in Criminal Cases* (33rd ed., 1954), p. 1324; Glanville Williams, *Criminal Law* (1953), vol. i, has no mention at all of offences against ambassadors.

[5] (1763) 1 Bl. 509; and see *infra*, p. 305.

[6] *Traité de diplomatie et de droit diplomatique* (1931), vol. iv, pp. 487–539.

[7] For the text see Hurst, op. cit., p. 181, where also legislation of this kind in other countries is mentioned.

The rule of the inviolability of diplomatic envoys is, however, said not to apply if the attack was in self-defence, was provoked by the envoy, occurred in the course of a duel (where duelling is lawful) or in 'a place of bad repute', or if the attacker was ignorant of the diplomatic status of his victim.[6] This kind of circumstance, however, is usually pleaded in defence of a charge of having committed a crime; it is not a ground for saying that the rule of law which makes the act in question a crime does not apply.

Again, Genet[7] cites a number of instances to show that when the rule has been broken, Governments have taken the responsibility for the breach upon themselves; they have in various dramatic ways exhibited regret for their dereliction of duty in not having prevented the affront to or attack on the envoy. They have given indemnities, they have made solemn apologies. But all this was long ago,[1] and it is doubtful whether any Government today would consider itself bound to submit itself to any such ceremonial of remorse, unless perhaps an envoy accredited to it had suffered premeditated outrage at the hands of its own officers.[2]

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[1] On attacks in the Press on diplomatic envoys see Hurst, op. cit., pp. 185–6.

[2] Replacing an earlier Law of 17 May 1819 which punished with imprisonment the defamation of an ambassador.

[3] The Law has been judicially interpreted widely to include the family of a diplomat, even in one case his divorced wife: see *Cottenet et Cie* v. *Raffalovitch*, decided by the Tribunal Civil de la Seine on 18 November 1907 (*Revue de droit international privé et droit pénal international*, 4 (1908), p. 615).

[4] Hatschek, *An Outline of International Law* (1930), p. 66, cites § 104, *Staatsgerichtsbuch* (1922): 'Anyone guilty of an offence against any ambassador or envoy accredited to the Reich will be sentenced to one year's imprisonment or confinement in a fortress.'

[5] See also the Rules applied by the Swiss Federal Political Department in matters of diplomatic and consular immunities and privileges, 1920, Article IV, in *Nouvelle Revue de droit international privé*, 15 (1948), pp. 411–23. In the United States of America, 1 Stat. 112, 118 punishes anyone who shall assault or in any other manner infract the law of nations 'by offering violence to the person of any ambassador or other public minister'; see Wilson, 'The International Law Standard in Statutes of the United States', in *American Journal of International Law*, 45 (1951), p. 732, at p. 734.

[6] Genet, op. cit., § 492. Cf. Satow, op. cit., § 321; Oppenheim, op. cit., vol. i, § 388 *ad fin.*; Hurst, op. cit., pp. 186–8; Hall, op. cit., § 50.

[7] Op. cit., § 493.

It is sometimes said[3] that an envoy's right to inviolability of the person protects him from arrest by the authorities of the State where he is accredited. The freedom from arrest enjoyed by envoys, which is not by any means absolute,[4] is, however, generally—and, it is thought, properly—derived from their immunity from the criminal jurisdiction of the receiving State. As to the right to inviolability of the person and protection from molestation, it may well be asked whether the correct view is not that it is an immunity or privilege adherent to the person of an envoy, but that it is a right to call upon the receiving State to exercise particularly towards the envoy its general duty towards all persons, nationals and aliens alike, within its territory.[5] That general duty consists of protecting the individual from assault, unlawful arrest, molestation, and the like; and any individual who considers himself especially threatened may apply to the local authorities for, and will receive, special protection.[6] It is difficult to see therefore why a diplomatic person, at least in settled conditions, should be in a privileged position in this regard as compared with the other inhabitants of civilized countries.[7] That, it would appear, was the opinion of Grotius,[8] who pointed out that if ambassadors were protected against nothing more than violence and illegal constraint, their privileges would confer no extraordinary advantage. It has been authoritatively suggested[1] that a State has not only the duty to abstain from acts injurious to diplomatic representatives accredited to it—which one might think did not need to be argued; it has a positive duty of protecting them which is higher than its duty of protecting its own subjects. At the same time, this theory admits that the State is under no obligation to provide penalties for offences against diplomatic agents provided that the normal processes of criminal law are adequate and are employed to pursue those who attack or assault those agents. Indeed, as has been seen, English law has not found it necessary to create and maintain specific offences to protect the person, property or reputation of a foreign diplomat. In 1763, more than fifty years after the passing of the Statute of Anne, at the conclusion of the hearing of *Rex* v. *D'Eon*[2] (a case of libel), Lord Mansfield C.J. took occasion to observe to the foreign ambassadors present in court that the laws of England 'paid as high a regard to the function of ambassadors and would equally protect them from all insults as well on their reputation as their persons or property as the laws of any other country'. The laws of England achieve this high purpose by treating alike all persons, private or official, aliens or nationals, within the realm.

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[1] But Hurst, op. cit., p. 178, instances the murder of the Greek naval attaché in Turkey in 1915, when Greece insisted on formal and solemn apologies, reparations, &c. He holds that a Government's failure to protect the person of a diplomatic representative justifies a general protest on the part of the whole Diplomatic Corps (ibid., p. 176).

[2] When Voronski, the Russian observer to the Lausanne Conference, was murdered in Switzerland in 1923, the Swiss Government expressed its regret but refused to do more, largely because Voronski's presence in the country had not been notified to them. See Hurst, op. cit., p. 179.

[3] See, e.g. Starke, *Introduction to International Law* (3rd ed., 1954), p. 287.

[4] See the authorities cited *supra*, p. 303, n. 6. See also Hale, *Pleas of the Crown*, vol. i (1778), p. 99: '. . . for capital offences as rape, murder, theft, which are . . . *contra pacem regis* yet . . . not *contra ligeantiae suae debitum*'; and the case of *Pantaleon Sà* in 1653 (Oppenheim, op. cit., § 404; Phillimore, *Commentaries* (3rd ed., 1879–88), vol. ii, §§ 169, 212).

[5] *Contra*, Pradier Fodéré (op. cit., p. 307, n. 1), vol. ii, p. 12: the duty to care for and protect a foreign minister is higher than the general duty of a State to protect all persons in its territory whether or not they are foreigners. This view is expressly adopted by Hurst, op. cit., p. 176.

[6] There are several dicta to this effect in English cases. Thus, Viscount Finlay said in *Glasbrook Bros. Ltd.* v. *Glamorgan County Council and Others*, [1925] A.C. 270, at p. 285: 'There is no doubt that it is the duty of the police to give adequate protection to all persons and to their property.' (Cf. *Glamorgan Coal Co., Ltd.* v. *Glamorganshire Standing Joint Committee*, [1915] 2 K.B. 206.) Again, 'I do not doubt the police owe a general duty to the public to preserve life and property': *per* Finlay J. in *Haynes* v. *Garwood*, [1934] K.B. 240, at p. 252. Cf. Maugham L.J., speaking of the police in London: '. . . there is a primary duty to protect the life and property of the inhabitants' (ibid. (on appeal), [1935] 1 K.B., at p. 163.)

[7] For the contrary view, that the right of a diplomatic agent to protection is derived from international law, see Pradier Fodéré, *ubi sup.*

[8] *De jure belli ac pacis*, L. ii, c. xviii, § 4.

II. *Taxation*

Perhaps the privilege of the greatest day-to-day importance enjoyed by diplomatic envoys is exemption from taxation. In a time when taxes of all kinds are both high and numerous, failure to exempt an envoy from the necessity of paying taxes might seriously incommode his way of life and even his performance of the diplomatic function. If it ever had that result, it might lead to a breach of the rule *omnis coactio abesse a legato debet*.[3] Yet, although such exemption is generally granted, the right to exemption is not universally established or conceded. Exemption is granted as a courtesy or from comity. The history of the topic has been chequered. Many conflicting quotations can be cited from medieval writers,[4] and it is clear that in practice there was considerable variation both from State to State and from time to time in the extent of the immunity granted to diplomatic envoys in the sixteenth and seventeenth centuries. In any event, at that time an ambassador was usually exempt from direct taxation, because direct taxation was normally based on the holding of land and an ambassador rarely held land in the receiving State. Later writers[5] have thought that immunity from taxation was anomalous, placing it among the privileges which the usage of nations has imparted to the ambassador and which are not derived from the reason of the thing. In the nineteenth century, ambassadors are found usually to be exempt from personal taxes, fixed loans, and the charges imposed on resident foreigners.[1] A review[2] of the position in the present century reveals a general diversity in matters of taxation which supports the suggestion that immunity cannot be claimed as of right, but is granted by courtesy. On the one hand, for example, Genet[3] derives all immunity from taxation from a 'quadruple base': (i) the ambassador is in principle exempt from all indirect taxation; (ii) he must pay direct personal taxes; (iii) he is subject to remunerative administrative taxes; and (iv) he has a considerable freedom from certain dues on the import and export of goods. These four rules would appear to constitute a very variable and unstable 'base', but one which is of a piece with the general lack of definition to be found in the attempts of most writers to set out the rules governing diplomatic exemption from taxation. The learned Editor of *Oppenheim*,[4] on the other hand, categorically bases the privilege of exemption from taxes on the exterritoriality of envoys, by reason of which they 'must be exempt from all direct personal taxation, and, therefore, need not pay income tax or any other direct taxes'.[5] No authority is quoted in support of this dictum, and indeed it would not be easy to find such authority. On the contrary, unless the expression 'envoys' is confined to ambassadors and other heads of mission, to the exclusion of their retinues and staff, diplomatic representatives are not in fact entirely exempt from income tax or the payment of other direct taxes. (And to the extent that they are so exempt, it is difficult to see what exterritoriality has to do with the case.)

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[1] Hurst, op. cit., p. 178.

[2] 1 Bl. 509.

[3] Grotius, *De jure belli ac pacis*, L. ii, c. xviii, § 9.

[4] See, e.g., Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), p. 94.

[5] E.g., Phillimore, op. cit., p. 209.

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[1] Phillimore, op. cit., p. 209.

[2] See Satow, op. cit., §§ 408–12. He quotes Hall, op. cit., § 394, to the effect that 'the person of a diplomatic agent' is not subject to taxation; otherwise, he enjoys no exemption from taxes or duties as of right. Hall adds that by courtesy, however, most if not all nations permit the entry free of duty of goods intended for his private use. See also Rivier, *Principes du Droit des Gens*, vol. i (1896), p. 503. At § 414 Satow gives examples of the exemptions accorded in the United Kingdom to diplomatic agents.

[3] Op. cit., vol. iv, p. 396.

[4] Op. cit., § 394.

[5] Op. cit., p. 803. In footnote 3 on that page is set out 'an account of the position in the matter of immunity from taxation enjoyed by members of foreign diplomatic missions in the United Kingdom', under the heads of (A) *National Taxation:* (*a*) *Income Tax*, (*b*) *Customs Franchise*, (*c*) *Motor-Car Licence Duty*, (*d*) *Wireless Licence Duty*; and (B) *Local Taxation* (viz., rates). Satow, op. cit., § 414, states that exemptions are accorded in Great Britain to diplomatic agents in regard to customs duties, motor-cars, income tax, motor-car licence duty, and local taxation licences. In §§ 415–23 he details the exemptions accorded to diplomatic agents 'so far as ascertained' in Belgium, France, Germany, Holland, Italy, Russia, Spain, Switzerland, and the United States of America. For a succinct but not unexceptionable statement of the English law on the subject, see Halsbury, *Laws of England*, vol. vii (3rd ed., 1954), p. 270: 'A public Minister's immunity as regards rates and taxes, although deducible from the general principles as to his freedom from taxation which are sanctioned by international usage, is sufficiently safeguarded by the fact that no action can be brought against him to enforce payment.' This is supported by citing *Parkinson* v. *Potter* (1885), 16 Q.B.D. 152.

As we have seen, there is much difference of opinion among writers[1] as to the existence of a right to exemption from taxation, and those who agree that there is such a right vary in their opinions as to its bases. It is thus difficult, if not impossible, to extract from them a satisfactory general rule concerning diplomatic immunity from taxation. It may suffice therefore if we examine certain kinds of taxation, and the practice respecting the immunity or otherwise of diplomatic envoys in regard to each.

1. *Income tax*

Although the institution of a tax on income is fairly universal, there are considerable differences from State to State in the ways in which liability to tax is established, the extent of an individual's liability assessed, the kinds of income which are taxable, and the machinery of collection. All these things have a bearing on the question whether a diplomatic agent[2] is liable to income tax in the State to which he is accredited, because the cardinal principle on which immunity from taxation or from any other burden should be based is the avoidance of *coactio*, that is, of hindering the agent from carrying out fully and freely the functions of his office. If the taxation of an envoy's income will so reduce it as to incommode him, prevent him from keeping up the state appropriate to his office, or hinder him from moving about in the exercise of his diplomatic functions, then to tax that income might be said to infringe the rules of international law.[1] On the other hand, is it to be tolerated that a person whose status entitles him to a number of necessary immunities, shall be free to make investments and enjoy unlimited freedom from taxation on dividends therefrom? A consideration of these two extremes, the essential and the doubtfully tolerable, explains perhaps why so much uncertainty and divergence exist among the authorities. Nor is there much agreement as to the basis of exemptions where they are granted. One opinion[2] regards the extent to which members of a diplomatic mission benefit by fiscal immunities as a matter of international comity rather than of international law. States have developed their own customs and traditions, but the rule is 'practically universal' that a diplomat is not subject to direct taxation on his official emoluments. And although Satow[3] claims that what he calls 'diplomatic emoluments', that is, the salary or wages of any member, not being a British subject, of the staff of a foreign mission, are immune from taxation, he is clearly stating only the practice in the United Kingdom, and does not concern himself with its basis. While there is general agreement[4] that diplomatic salaries 'would certainly not be taxed' it is clear that, for example, tax on investment dividends deducted at source, an important feature of the machinery of income tax collection in England, would not be repaid. In fact, exemption from income tax, although widespread, is probably not based on any rule of international law. The general exclusion from the privilege of diplomatic representatives who are nationals of the receiving State is in itself evidence that the exemption is a matter of municipal law,[5] its incidence being based on something like international comity. There is, moreover, room for the view that it could be said to offend the sense of what is fitting for one State to add to its revenues by taxing the salaries of officers of another State which are paid by that other State, and it may be that it is this, under the guise of comity or courtesy,[1] rather than compliance with the rule *ne impediatur legato*, that forms the basis of the exemption from taxation of diplomatic salaries.[2]

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[1] Cf. Bluntschli (op. cit., p. 222), who would accord complete immunity from taxation to a diplomatic agent 'parce qu'il n'est asujetté à aucun des pouvoirs de l'état auprès duquel son gouvernement l'envoi'. Déak (loc. cit., at pp. 537 and 565) considers such immunity 'merely a logical consequence of the privileged situation of diplomatic agents', and points out that the payment of [direct] taxes cannot be enforced—except where the agent is a subject of the receiving State. Droin (*L'Exterritorialité des agents diplomatiques* (1895), pp. 164–6) suggests that the basis of exemption of diplomatic agents from direct personal taxes is that such taxes are only levied on subjects of the receiving State and it would be incompatible with the independence of the agent to levy them on him. However, he cites (*a*) Laurent, *Droit civil international*, vol. iii, p. 140, as saying that taxation should fall on all who live in a State, whether nationals or aliens; all enjoy the protection of the State and all ought therefore to pay the taxes without which the State could not fulfil its functions, and (*b*) Pradier Fodéré, *Traité de droit international public* (1885), vol. iii, p. 1401, who reasons thus: if foreigners are subject to personal taxation, it is because they are domiciled or have at least a fixed residence in the State levying the tax they may be regarded as temporary subjects of that State. A diplomatic agent cannot be regarded as even a temporary subject; the protection of his person and goods is his due under international law. He therefore need not pay taxes.

Cf. also the *Washington Project* (see *supra*, p. 299), § 24: 'Diplomatic agents shall be exempt in the country where they are accredited (1) from personal taxes either national or local. . . .'; Resolution of the Institute of International Law, Article 11: 'Ministers and their subordinates and families are exempt from direct personal taxes, income tax [&c.]' (cited in *A.J.* 20 (1926), Special Suppl., p. 155); Report of the League of Nations Committee of Experts (see *supra*, p. 299): Immunities from taxation 'are not strictly necessary for the exercise of diplomatic functions and they are granted to members of foreign missions simply for reasons of international courtesy. . . . They vary greatly in the different countries' (cited ibid., pp. 149, 170, 171); the Harvard Draft Convention of 1932, § 22: 'Exemption from Taxation: The receiving State shall not impose any taxes whether national or local upon (1) the person of a member of a mission [&c.]. . . .' Such exemption is said (at p. 115) to be based on international courtesy; it is 'part of the non-essential prerogatives of diplomats. It has no ancient basis in international law but is well established in modern usage', though it varies from State to State.

[2] With regard to consuls, 'a claim to immunity from taxation is put forward by many writers, but there is no direct authority in English law as to this': Halsbury, op. cit., p. 278. See Oppenheim, op. cit., § 437 (5), and Beckett in this *Year Book*, 21 (1944), pp. 34–50; and also *infra*, p. 310, n. 1.

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[1] Cf. Pradier Fodéré, op. cit., § 1403, who holds that envoys should be exempt from taxes on both capital and income. He bases his claim on the exterritoriality of the agent and also suggests that the independence of the latter is involved. He would, however, allow taxation of *la fortune mobilière*, a tax on personal estate which attaches to the person. Exemption is not founded on international necessity nor on the public character of the diplomatic agent; it is not indispensable to the full accomplishment of his mission. Odier, *Des Privilèges et immunités des agents diplomatiques* (1890), p. 254, contradicts this view.

[2] Cf. Hurst, op. cit., p. 119.

[3] Op. cit., § 414.

[4] See e.g. Brierly, *The Law of Nations*, 4th ed. (1949), p. 201.

[5] There is no doubt that diplomatic representatives who are British subjects can claim diplomatic privileges *jure gentium*—cf. a long line of cases from *Seacombe* v. *Bowlney* (1743), 1 Wils. 20, to *Macartney* v. *Garbutt* (1890), L.R. 2 Q.B. 368. On the general question whether diplomatic immunity must be granted to envoys who are nationals of the receiving State see *Harvard Research*, Article 8, at pp. 69–70, and literature there cited. See also Note in *Annual Digest*, 1941–1942, p. 364.

No such considerations apply prima facie to income derived by an envoy from some private activity which he conducts apart from his office.[3] It is not known to what extent ministers of foreign legations nowadays indulge in trade or commerce,[4] but it is conceivable and possibly not rare that, for example, the legal adviser of an embassy, or some member of the staff of an embassy who has legal qualifications, might give advice to private litigants on the law of his own country, advice for which he is paid. On principle it would seem that income from such a source or from other similar sources external to the individual's employment in the embassy should be taxed,[5] although it may be objected that the assessment of the tax could not in practice be enforced.[6] That objection is of limited validity. Although the sanction of civil proceedings is lacking by reason of the general rule of diplomatic immunity from the jurisdiction of local courts, there remain at least two possibilities: one is that the employment may be terminated, and with it the immunity of the individual;[7] and the other is that the revenue authorities of the receiving State may come to an arrangement with the heads of missions whereby members of their staffs are induced to pay fiscal taxes on extraneous incomes in the same way as they are induced to pay debts owing to members of the public.[8]

It may be of interest at this point to consider the law and the practice adopted in the United Kingdom[9] regarding the immunity from income tax enjoyed by members of foreign diplomatic missions. The law is contained in the Income Tax Act, 1952, the relevant provisions of which are somewhat verbose and obscure, and not always helpful. There is no general exemption of diplomatic persons from income tax. There is a specific exemption in section 119 (3) in favour of Heads of Missions only with regard to that form of tax known as Schedule 'C' (profits arising from public revenue dividends in the United Kingdom, in other words, British Government securities): 'No tax shall be chargeable in respect of the stock dividends or interest of any accredited minister of any foreign State resident in the United Kingdom', and sub-section (4) extends this exemption to proceeds of sale or other realization of coupons. The nearest thing to a general exemption from taxation is contained in section 461 of the Act, and that only by implication.[1] Section 461 (1) grants to High Commissioners and Agents General for self-governing Dominions of the British Commonwealth of Nations resident in the United Kingdom 'the same immunity from income tax and land tax as that to which an accredited minister of a foreign State so resident is entitled whether by virtue of any Act or otherwise'. Section 461 (2) grants to members of the personal staff of any High Commissioner who are (i) ordinarily resident outside the United Kingdom, and (ii) not employed in any trade or business, &c., 'the same immunity from taxation as that to which a member of the staff of an accredited minister of a foreign State is entitled whether by virtue of any Act or otherwise'. By 'any Act' is presumably meant such as enactment as, for example, the International Organizations (Immunities and Privileges) Act, 1950, which provides[2] for the conferring on certain organizations[3] of the same exemption or relief from taxes and rates, other than taxes on the importation of goods, as is accorded to a foreign sovereign. The Act of 1950 also provides that representatives of the organization or its committees, high officers of the organization, and persons employed on missions on its behalf, shall enjoy the like exemption or relief from taxes as is accorded to an envoy of a foreign sovereign Power accredited to her Majesty, and that other officers or servants of the organization shall be granted exemption from income tax in respect of their official emoluments.[1] 'Or otherwise' in section 461 (1) of the Income Tax Act presumably means the general law, which is to be ascertained from writers on income tax and on international law respectively; but there is a clear implication that the income of diplomatic representatives is exempt from tax.[2]

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[1] Cf. League of Nations Committee of Experts (*ubi supra*, p. 299): 'Immunity from taxation is not strictly necessary for the exercise of diplomatic functions and is granted to members of foreign missions simply for reasons of international courtesy.'

[2] See, e.g., *Harvard Draft*, § 22, 'Exemption from taxation': 'The receiving State shall not impose any taxes . . . upon . . . (*b*) the salary of a member of a mission [etc.] paid by the sending State, (*c*) income from other sources [unless the member is a national of the receiving State].'

[3] Cf. Lisboa, 'Exterritorialité et immunités des agents diplomatiques', *Revue de droit international et législation comparée* (1899), at p. 358: 'The distinction between the official and the private character of a diplomatic agent is logical and necessary.'

[4] See Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), p. 98.

[5] 'The purpose of immunities . . . is not [to enable diplomatic envoys] to fulfil tasks lying outside their functions': Hurst, op. cit., p. 126.

[6] A more cogent objection perhaps is that the receipt of income might not be 'returned' to the authorities.

[7] Cf. *In re Suarez*, [1917] 2 Ch. 131; [1918] 1 Ch. 176; and *Rex* v. *A.B.*, [1941] 1 K.B. 454. See Jones, 'Termination of Diplomatic Immunity', in this *Year Book*, 25 (1948), pp. 262–79.

[8] See Oppenheim, op. cit., § 391*a*.

[9] In the United States of America, ambassadors and ministers accredited to that State, and members of their households (including secretaries, attachés and servants) who are not citizens of the United States, are exempt from payment of Federal income tax upon their salaries, fees or wages. Their income from all sources other than a business carried on by them in the United States is also exempt. These provisions apply also to the families of the persons mentioned (Treasury Regulations 103 (1940), Section 19. 116. I, cited by Hackworth, *Digest of International Law* (1942), vol. iv, § 406).

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[1] Section 462 of the Act of 1952 exempts from tax income arising from the office of consul in the United Kingdom in the service of any foreign State, or the employment of an official agent in the United Kingdom of any foreign State (except when such consular agent is a British subject or citizen of the Republic of Ireland) or exercised in connexion with any trade, business, &c., carried on for profit.

[2] S. 1 (2) (*a*). See also Part I of the Schedule to the Act.

[3] Declared by Order in Council to be one of which the United Kingdom or its Government and one or more foreign sovereign Powers or Governments are members. The Act cannot, it would seem, be applied to an international organization of which this country is not a member, e.g. the Organization of American States. By s. 5 of the Act, the immunities and privileges may be withdrawn if reciprocal treatment is refused. For references to Orders made under the Act see Halsbury, op. cit., pp. 276–7, and, for an analysis of their effect, see *Rating and Income Tax*, 48 (1955) p. 151. Under the Diplomatic Privileges (General Amendment) Order in Council, 1950 (S.I. 1950, No. 515), exemption from income tax extends only to official emoluments.

As regards the practice, the governing principle recognized in the administration of the Income Tax Act is that the Heads of Foreign Diplomatic Missions in the United Kingdom, and all persons, of whatever rank, on their staffs (except British subjects)[3] are entitled to certain exemptions from income tax. No distinction is made between ranks or classes of officials. A clerk, typist, or domestic servant on the staff at an embassy or legation, unless he is a British subject, is treated as entitled, so far as income tax is concerned, to the same immunities as, for example, a counsellor, secretary, or attaché. The only exception is in the case of any individual on the staff of a mission personally engaged in trade or business, and what follows cannot be taken as applying to such individuals.

(*a*) *Income from earnings*. Diplomatic emoluments, or salary or wages paid to any member of the official or domestic staff (except a British subject) for his duties in connexion with the mission, are treated as exempt from United Kingdom tax. No exemption is granted in respect of any other earnings in this country, e.g. fees from the directorship of a company.

(*b*) *Income from investments, &c.* Income derived by any member of the official or domestic staff (except a British subject) from sources outside the United Kingdom, whether retained abroad or remitted to the United Kingdom, is treated as exempt from income tax. Income derived from certain British Government securities issued with a condition that they shall not be liable to tax while in the beneficial ownership of persons not ordinarily resident in the United Kingdom is also treated as exempt from income tax, but except under section 119 (3) there is no other exemption in respect of investment income.

If a member of the staff of a mission has any other income it is liable to assessment, but in calculating any duty which may be payable effect is given to the personal allowance and any other of the usual reliefs which may be applicable. These reliefs are given to the same extent as in the case of a United Kingdom resident, in spite of the fact that the diplomatic person is wholly relieved from tax in respect of income arising abroad, in the same way as a person residing outside the United Kingdom.[1]

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[1] See also s. 1 (2) and Part IV of the Schedule to the Act, as to official staff and families of representatives of an organization or its committees.

[2] This form of legislation by reference is echoed in the Anglo-Russian Trade Agreement of 16 March 1921: see *Fenton Textile Association Ltd.* v. *Krassin and Others* (1921), 38 T.L.R. 259. Article 5 of that Agreement defined the rights and immunities of official agents, including immunity from taxation, thus: 'the same privileges in respect of taxation, central or local, as are accorded to the official representatives of other foreign governments'. Said Atkin J. (at p. 262): 'It was contended by the defendant that the British Legislature has made no provision exempting official agents from central or local taxation and that the contracting parties must therefore have considered the official agents to be entitled to diplomatic immunity, otherwise the provisions for such exemption are nugatory. It is a forcible argument, though we are not told whether the specified immunities are in fact withheld.'

[3] As an exception to the general rule that British subjects are not entitled to any of the foregoing privileges, members of the *domestic* staff engaged prior to 27 August 1952 are treated as so entitled irrespective of nationality.

Judicial decisions. The liability of diplomatic persons to income tax comes but infrequently under judicial review. The following cases are among the few which appear in the *Annual Digest and Reports of Public International Law Cases*. In France, in the somewhat curious case of *In re Société Anonyme des Grands Garages Parisiens*,[2] the Conseil de Prefecture de la Seine held in 1930 that income tax was payable by the vendor in respect of the sale of motor-cars to foreign diplomatic agents accredited to the French Government. The Conseil refused to extend to a trader the benefit of the fiction of exterritoriality 'enjoyed by persons attached to the diplomatic service for themselves and for objects intended for their use in the hôtels and other places occupied by them'.

In Italy, Article 7 of the Law of 24 August 1877 exempted from income tax 'diplomatic agents of foreign nations', and the Royal Decree of 30 December 1923 exempted more specifically 'ambassadors and other diplomatic agents of foreign nations'. This has been held[3] to extend not only to heads of mission but also to their official staff.[4] Article 12 (2) of the Lateran Treaty of 11 February 1929[5] provides that 'Envoys of foreign governments to the Holy See will continue to enjoy in the Kingdom of Italy all the privileges and immunities which pertain to diplomatic agents according to international law'. This has been interpreted[6] by an Italian Court as meaning the same immunities as those which are granted to the diplomatic corps accredited to the Italian Government. But an Italian citizen who became Counsellor of the Legation of Nicaragua to the Holy See has been held not entitled to demand exemption from the fulfilment of his duties, especially from taxation, as far as his own country is concerned.[1]

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[1] In an article in this *Year Book*, 25 (1948), pp. 262–79, Dr. R. G. Jones mentions instances in which the liability to taxation of a diplomatic agent was called in question. In 1873 the Brazilian Chargé d'Affaires in London had occasion to point out to the Foreign Office that when he first assumed his diplomatic post he had been assured that he was not liable for taxes. In 1837 one Sir Robert Peat, committed to prison for non-payment of taxes, claimed immunity on the ground that during the material period he had been Librarian at the Portuguese Embassy in London. The Law Officers advised that even if he had enjoyed immunity while so employed, it was clear that (by the time of the committal to prison) his connexion with the Embassy had come to an end.

[2] *Clunet*, 58 (1931), p. 90; *Annual Digest*, 1929–1930, Case No. 192.

[3] *In re Marchese Di Sorbello*, decided by the Italian Central Commission for Direct Taxes on 26 March 1941 (*Foro Italiano*, 66 (1941), III, p. 176; *Annual Digest*, 1941–1942, Case No. 108).

[4] It probably does not extend to non-diplomatic agents of a foreign State. Cf. *Landahl* v. *Swedish Government*, decided by the Supreme Administrative Court of Sweden on 9 December 1927, in which it was held that the exemption granted by Swedish income tax law to the members of foreign legations and consulates and their servants did not apply to a United States citizen resident in Sweden and employed by the United States Shipping Board (*Regeringrättens årsbok*, 1927, Not. Fi. No. 1155; *Annual Digest*, 1927–1928, Case No. 270).

[5] See *American Journal of International Law*, 23 (1929), Suppl., p. 187.

[6] In *In re Di Sorbello* (*ubi sup.*).

A German Court, in 1929, appears to have taken a rather restrictive view of an envoy's immunity from income tax. While conceding that, according to generally recognized rules of international law, administrative penalties may not be imposed, or threatened, on persons enjoying diplomatic privileges, and that envoys had general immunity from taxation, certain income (not specified in the report) might 'for special reasons' be subject to taxation. In such cases, collection of tax by way of execution was inadmissible only so far as it interfered with the normal functions of the envoy; therefore execution was inadmissible only against the person of the envoy and against such property as was necessary for the proper fulfilment of his diplomatic functions but not against other property.[2] This is saying in a negative and slightly roundabout way that when there are special reasons which make part of an envoy's income taxable, that taxation may be enforced by any means short of *coactio*.

Treaties. Besides the Lateran Treaty of 1929, immunity of diplomatic persons from income tax is occasionally provided for in treaties dealing with taxation and also in agreements made in furtherance of general conventions regulating the status of international organizations. Thus, the Italian–German Convention for the Avoidance of Double Taxation and the Settlement of other Questions connected with Direct Taxes, of 31 October 1925,[3] provides in Article 14:

> 'The diplomatic, consular and extraordinary representatives of each Contracting State, so far as they are *de carrière* [and members of their staff and retinue] shall be exempt from direct taxation in the State to which they are accredited.'

Exemption is limited to nationals of the sending State, to the exclusion therefore of nationals of the receiving State or third States, and is forfeited if they exercise any profession, industry or other employment of profit outside their offices (which, strictly interpreted, would seem to exclude employment within the embassy or consular premises) or in addition to their official duties. A general convention of the kind mentioned was the Covenant of the League of Nations, Article 7 (4) of which provided that 'Representatives of the Members of the League and officials of the League, when engaged on the business of the League, shall enjoy diplomatic privileges and immunities'.[4] In furtherance of this provision, on 20

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[1] *In re Di Sorbello* (*ubi sup.*).

[2] *Diplomatic Envoy* (*Exemption from Taxation*) case, decided by the Reichsfinanzhof on 28 May 1927: *R. für ä. und ö. R. und V.*, i (2) (1929), p. 202; *Annual Digest*, 1927–1928, Case No. 248.

[3] *L.N.T.S.*, vol. 53, p. 246.

[4] League of Nations, *Official Journal*, 1928, pp. 985–7. Cf. Article 105 (1) and (2) of the Charter of the United Nations:

'Representatives of the Members of the United Nations and officials of the Organization

September 1926 an Agreement was concluded between the Council of the League and the Swiss Federal Council, Articles VIII and IX of which made a distinction between officials of the League who were Swiss nationals and those who were not. By Article IX (2) it was provided that those who were Swiss nationals should be exempt from direct taxation only in respect of emoluments paid by the League.

Under Article 19 of the Statute of the Permanent Court of International Justice, members of the Court when engaged on the business of the Court were to enjoy diplomatic privileges and immunities. An Agreement of 22 May 1928 made between the President of the Court and the Dutch Minister for Foreign Affairs, regulating the application of Article 19 of the Statute, distinguished between judges who were and those who were not Dutch nationals. Those who were, were exempt from income tax in respect only of the salaries and allowances which they received from the Court. Article 19 of the Statute of the International Court of Justice contains provisions similar to those in Article 19 of the Statute of the Permanent Court, and Article 42 provides that the agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary for the independent exercise of their duties.[1] On 13 February 1946, the First General Assembly of the United Nations adopted a Resolution[2] concerning the 'privileges, immunities and facilities necessary for the exercise of [the] functions and the fulfilment of [the] purposes' of the International Court. In consequence, an Exchange of Letters[3] took place in June 1946 between the President of the Court and the Dutch Minister for Foreign Affairs, and agreement was reached on the general principles that should govern the matter. Thus, it was agreed that as concerns the privileges, immunities, facilities and prerogatives within the territory of the Netherlands of members and staff of the Court of other than Dutch nationality, these persons should be accorded 'in a general way' the same treatment as heads

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shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

'The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.'

[1] Under the International Organizations (Immunities and Privileges) Act, 1950, s. 3, Judges and Registrars of the Court and suitors to the Court and their agents, counsel and advocates may have conferred upon them by Order in Council such immunities, privileges and facilities as may be required to give effect to any resolution of, or convention approved by, the General Assembly of the United Nations. See the Diplomatic Privileges (United Nations and International Court of Justice) Order in Council, 1947 (S.R. & O. 1947, No. 1772 (as amended by S.I. 1949, No. 1428) made under the Diplomatic Privileges (Extension) Act, 1944, and saved by the Act of 1950.

[2] U.N. Doc. A.64.1946, p. 33. The Agreement contains a notable provision (Appendix, para. 4) which can be regarded as of wider application: 'Privileges and immunities are granted in the interests of the administration of international justice and not in the personal interests of the beneficiary.'

[3] See *I.C.J. Yearbook*, 1946–7, pp. 89–91.

and other members of diplomatic missions at The Hague. It was also provided that 'Netherlands nationals of whatever rank are exempt from direct taxation on the salaries allotted to them from the Court's Budget'. This provision is of interest as showing that diplomatic envoys and their staffs of other than Dutch nationality in Holland are exempt, and that those of Dutch nationality are not exempt, from income tax.[1]

2. *Purchase tax*

Purchase tax, a tax payable by the purchaser of articles of specified classes, was instituted in England in 1940, but a similar tax, in one form or another, has been in existence in many countries for a considerable period. It is believed that diplomatic representatives are not generally exempt from having to pay tax of this kind. It may be objected that the payment of purchase tax will increase, perhaps considerably, the price of articles needed to furnish and maintain the offices and other rooms of the legation premises, and to clothe and fit out the Ambassador and his retinue in a way befitting his position. The purchase tax on a motor-car, for example, can be a very large sum, and if the minister of a foreign State cannot by reason of the tax afford to buy such a motor-car as he ought properly to use for the exercise of his diplomatic functions, he will have cause for complaint; it is near to *coactio*. On the other hand, so far as the United Kingdom is concerned, the Board of Trade take the view that the administrative difficulties in the way of making special concessions to diplomats are insuperable; foreign envoys in this country are treated as 'residents'.[2] They are not, for example, permitted to take advantage of the 'personal export' scheme, whereby articles subject to purchase tax bought by a non-resident are delivered free of tax to that person on his departure from this country. Nevertheless, when goods imported by or for diplomatic persons are exempt from customs duties, they are also exempt from any purchase tax levied along with the duty at the time of importation.[3]

In the United States of America, diplomatic agents are not exempt from purchase tax on articles on which the tax has accrued and become payable by the manufacturer, producer or importer prior to the sale to the diplomat.[4] As regards sales tax, however, members of a diplomat's household are exempt 'as a matter of policy', and since 1936 certificates of exemption have been given to individuals to enable them to make purchases without being charged sales tax.[1] Similarly, 'as a matter of international comity rather than as a result of any provision of law', the luxury tax does not attach in the United States to sales to ambassadors and other diplomatic agents.[2]

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[1] By a Treaty made on 18 August 1938 between the European Commission of the Danube and the Roumanian Government, higher officials of the Commission enjoy immunity from tax 'in accordance with international practice'. Other officials are exempt from taxation on their emoluments and from 'general income tax'. See *Annual Digest*, 1941–1942, p. 362. By the Italian Law of 20 June 1930 (No. 1075), diplomatic privileges and immunities are granted to representatives attached to the International Institute of Agriculture in Rome if the sending State is a member of the Institute. The immunities do not, however, include exemption from taxation, which can be granted only as a special concession by the Ministry of Foreign Affairs. See ibid., p. 363. As to the Mixed Arbitral Tribunals set up under the Treaty of Versailles see Hurst, op. cit., p. 119.

[2] See *The Sunday Times* newspaper, 19 July 1950.

[3] Oppenheim, op. cit., p. 804.

[4] Hackworth, op. cit., vol. iv, § 571.

In France, the 'impôts de consommation' are payable by diplomats on goods purchased in the country when the tax is included by the vendor in the price and is part of the price.[3] According to Hackworth,[4] in 1918 the American Ambassador in Paris was instructed by the Department of State not to claim exemption from the sales tax of 10 per cent. on the purchase price of commodities if that impost was in fact indirect taxation.[5]

It will be seen that in view of the complicated method by which taxes of this kind are calculated and imposed, the administration of any form of exemption in favour of diplomatic persons must be on an *ad hoc* and empirical basis. But there does not appear to be any need for a general rule that diplomatic persons are in any way entitled to exemption. The payment of purchase tax and the like on ordinary articles of daily use bought by members of a diplomatic mission and their families simply increases the price of those articles, and hence increases the 'cost of living'. Such increases ought to be, and doubtless in practice are, met by suitable 'foreign living allowances' made by the home State. It is only in exceptional cases, where the purchase tax is so high and falls on articles so essential to the conduct and operation of the mission that it is a positive hindrance to its successful functioning, that any form of concession by the receiving State is called for.

3. *Death duties*

The incidence of death duties—legacy duty, estate duty, and the like—is in some countries dependent on nationality, in others on residence, and in others again on domicil—a term which may have a different significance in different countries. In some countries the criterion is neither the domicil nor the residence of the person concerned but the *situs* of the property. It is therefore peculiarly difficult to ascertain the rules governing the liability to tax of property passing on the death of a diplomatic agent. In the United Kingdom, at any rate, death duties are creations of the late eighteenth and the nineteenth centuries, and it appears that a hundred years ago the position was that on the death of an agent the movables which belonged to him were exempt from 'any kind of tax or imposition'.[1]

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[1] Hackworth, op. cit., vol. iv, § 572.

[2] Ibid., § 573.

[3] Droin, op. cit., p. 173.

[4] Op. cit., § 572.

[5] As to the German *Umsatzsteuer* see *Legation Buildings* (*Turnover Tax*) Case (*Juristische Wochenschrift*, 1923, p. 194; *Annual Digest*, 1919–1922, Case No. 207; cited in this *Year Book*, 30 (1953), p. 132). As to Hungary see *In re J.N.*, in which the Supreme Administrative Court on 15 May 1924 dismissed an application by a company for remission of luxury tax on goods sold to a foreign diplomat, there being no statutory provisions exempting diplomatic persons from the tax (*Annual Digest*, 1923–1924, Case No. 171). In 1923, the American Minister to Poland instituted a claim on the basis of reciprocity for exemption from payment of taxes 'applying directly to the individual' but not indirect taxes where the price was 'made high enough to contemplate the tax or was added by the manufacturer or dealer to the price of the article as a specific item' (Hackworth, op. cit., § 573). It must be admitted that in this example the distinction is not very clear.

The question of the liability of the estate of a deceased diplomatic person to legacy duty was considered by the English Court of Exchequer in 1862, in *Attorney-General* v. *Kent and Others*.[2] The domicil of origin of the testator in that case was Portuguese. He had lived in the United Kingdom for many years, and two years before his death he was appointed attaché to the Portuguese Legation. The Revenue Authorities claimed legacy duty, and his executor resisted the claim on the ground that the estate was not subject to legacy duty. It was held that he had acquired a domicil in this country which he did not lose by his appointment as attaché; his estate was therefore liable to legacy duty. In the course of his Judgment, Baron Wilde[3] quoted Wharton[4] to the effect that a public minister is entitled to entire exemption from the local jurisdiction, and Grotius[5] to the effect that for an ambassador to be free, his goods must be free, but not, as the learned Baron pointed out, after his death. He added: 'No doubt that means nothing more than this, that for the purpose of illustrating the complete sacredness of the person of an ambassador in this country and his immunity from the civil law of this country, he is to be looked upon as if he were residing within his own country. It means nothing more, and when that is applied to a case like the present, things that are totally different are confused together. It is said that he is freed from taxes during his life and from the operation of the civil law. It must be observed that the subjection to those laws does not depend upon domicil.' The exemption as to an ambassador's property, added the learned Baron, affects the movables which belong to him and which could not be interfered with without interfering with his personal comfort and dignity as an ambassador and by no means extends to all his property in this country. The exemption is not the same after his death as when he was alive. 'It has by no means the least application to property which remains after his death.'

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[1] Phillimore, op. cit., vol. ii, p. 234. He instances the *droit d'aubaine*, which is in fact the right of a State to confiscate the whole estate of an alien deceased on its territory (see Oppenheim, op. cit., vol. i, § 322). *Droit d'aubaine* is defined as 'A rule by which all the property of a deceased foreigner was confiscated to the use of the State to the exclusion of his heirs whether claiming *ab intestatio* or under a will': *Encyclopedic Law Dictionary* (1940). According to Genet, op. cit., vol. iv, p. 448, property on diplomatic premises which belonged to a deceased envoy is by virtue of the principle of exterritoriality regarded as being in foreign territory.

[2] 31 L.J. (Ex.) 391. Cf. *Heath* v. *Samson* (1851), 14 Beav. 441, which concerned the Sardinian Ambassador in London. He had resided in England for periods of several years at a time. Romilly M.R. found on the evidence that he died domiciled in England.

[3] At p. 397.

[4] *Elements of International Law* (ed. by Lawrence), chap. 1, § 17.

[5] L. ii, c. xviii, § 5.

The position in the United Kingdom[1] today is that (legacy duty having been abolished in 1949) only estate duty remains. The administration of the duty is governed by the Finance Act, 1894, section 1 of which levies estate duty on the principal value of all property which passes on the death of 'every person' dying after the commencement of the Act. The scope of 'every person' is limited by section 28 (2) of the Finance Act, 1949, which amends the Act of 1894. The effect of that amendment is complicated but for the present purpose may be briefly summarized thus: if (i) the 'property which passes' is situate out of the United Kingdom, and (ii) the proper law regulating the devolution of the property so situate is the law neither of England nor of Scotland, and (iii) either (*a*) the deceased was not at the time of his death domiciled in Great Britain, or (*b*) the property passes under a disposition (e.g. a will) made by a person domiciled elsewhere than in Great Britain, then estate duty is not payable.[2] Relating these rules to diplomatic envoys, movable property at a foreign embassy in this country belonging to a foreign ambassador or other agent or to a member of his suite is considered to be constructively situate abroad (unless the deceased died domiciled in this country, which might be the case if, for instance, he were a British subject employed at an embassy) and is not liable to estate duty on the death of the ambassador, &c. This exemption is said to be granted as a matter of international comity.[3] But the exemption is limited to property physically within the embassy, and all other property belonging to the agent is chargeable with estate duty at his death.[4] Thus, money which he might have had at a bank here would not be exempt,[5] nor would such choses in action as bonds, bills of exchange, and the like.

The question of the domicil of an envoy in relation to death duties has also been considered by the Supreme Court of Peru. The Peruvian Minister to the Holy See inherited certain property; he claimed to be liable to pay tax at the lower rate applicable to persons domiciled in Peru. It was held that the Minister must be considered as domiciled in Rome. 'The immunities which international law accords to the diplomatic representative, to assure his independence, do not modify the rules of private law to which he is subject in his own country', and tax must be paid at the higher rate.[6]

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[1] For the position in the United States see Hackworth, op. cit., vol. iv, p. 584.

[2] Dymond, *Death Duties* (12th ed., 1955), pp. 705–6.

[3] *Green's Death Duties* (3rd ed., 1952), p. 404.

[4] Dymond, op. cit., pp. 701–2. See ibid., p. 470, for consular conventions with the United States, Norway, Sweden and France which exempt movable property in this country used exclusively for the consular purposes of the State with which the convention is made.

[5] *Hanson's Death Duties* (9th ed., 1946), p. 45.

[6] *In re Succession of Dona Carmen de Goyonache* (*Anales Judiciales*, 1921, p. 26; *Annual Digest*, 1919–1922, Case No. 209).

The complexity and artificiality of the rules leading to the exemption in favour of diplomatic persons strongly suggests, as is believed to be the case, that the rules are based on comity (and perhaps administrative convenience) and not on any obligation of international law. That that must be so is borne out by the fact that by no stretch of imagination can post-mortem taxation, or even the apprehension of it, constitute any hindrance to a diplomatic envoy in the discharge of his duties.

4. *Miscellanous taxes*[1]

In France, the Conseil d'État has held, in *Thams* v. *Minister of Finance*, that the plaintiff, a Norwegian subject who exercised at Paris the functions of Counsellor to the Legation of Monaco, was exempt from the *contribution personnelle et mobilière* (a capitation tax assessed on a fixed basis and on the annual value of the residence)[2] and from municipal rates. He was not, however, exempt from his *contribution des patentes* (professional licence) in respect of an agency which he carried on at Paris nor from rates on the premises where the agency was established.[3] This case aptly illustrates the principle that if a diplomatic envoy is entitled to immunity from taxation, that immunity—as, indeed, all immunities—should be restricted to what is necessary to him for the accomplishment of his mission. If he carries on an independent trade, profession or other activity having nothing in common with his diplomatic function, it cannot be regarded as necessary for the fulfilment of that function; he must pay any taxes levied on the exercise of that trade, profession or activity.[4]

To support his 'quadruple basis' of the rules governing the liability of diplomatic envoys to taxation,[5] Genet examines[6] the taxation laws of various countries and finds, for example, that the envoy is generally exempt from such a tax as the *décimes de guerre* or 10 per cent. addition to certain taxes to provide a war subvention.[7] It might well be thought, however, that the true basis of this exemption is the impropriety of making the representative of a foreign State subscribe directly towards the war expenditure of the receiving State. The hôtel of an ambassador is normally exempt from having soldiers billeted there;[8] and in countries where a tax is imposed on householders in lieu of having soldiers billeted on them, the ambassador, as might be expected, is exempt from having to pay that tax. There can be no tax in lieu of some other burden which cannot otherwise be imposed. According to Genet, however, the reason for the exemption lies rather in the fact that an ambassador is not under the protection of the army of the State to which he is accredited; he is under the sacred principles of the law of nations. He is therefore not bound to contribute to the upkeep of the army.

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[1] See also *supra*, p. 306, n. 5.

[2] In *Dientz* v. *La Jara*, the Tribunal Civil de la Seine held on 31 July 1878 that the fact that the French Government had exempted the defendant from the *contribution personnelle et mobilière* was evidence that he was entitled to diplomatic immunity (*Clunet*, 5 (1878), p. 500). Somewhat similar reasoning was used arguendo in *Fenton* v. *Krassin* (noted *supra*, p. 311).

[3] *Clunet*, 58 (1931), p. 362; *Sirey*, 1931, Part 3, p. 13; *Annual Digest*, 1929–1930, Case No. 191.

[4] Cf. Heffter, *Droit International public*, i. 3, § 217.

[5] See *supra*, p. 306.

[6] Op. cit., vol. iv, pp. 433–48.

[7] Cf. Fiore, *International Law Codified* (1890) (trans. by Borchard, 1918), p. 553, on 'war tax', and Pessôa, *Projeto de Código de Dereito Internacional Público* (1911) (cited in *A.J.* 26 (1932), pp. 164–8), p. 135, on 'war contributions'.

[8] Genet, op. cit., p. 435.

As regards stamp duties and the like, it would seem that in France[1] diplomatic envoys are liable to pay the duties required on registration of certain documents, shares, bills of sale, and so on. The lease of the embassy building and of the residence of the envoy is exempt from stamp duty; not so, however, leases of properties away from the hotel, such as shooting lodges, sea-side villas, &c., owned by the diplomat.[2] Where a transaction requires the use of *papier timbré* for its validity, envoys who are parties to that transaction have no dispensation from the requirement.

On the other hand, it appears that in the United States of America, diplomatic agents are exempt from a large variety of Federal taxes on telephones, transfers of stock and bonds, foreign insurance policies, cheques, and so on, 'under the application of the principles of international law exempting from taxation ambassadors, ministers [&c.]'.[3] In the United Kingdom, however, where a stamp duty is regarded as being imposed on the document (transfer, policy, cheque, &c.) required to be stamped—*quasi in rem*—and not on any particular person, there is no exemption in favour of diplomatic envoys.

5. *Customs*

There is general agreement among writers on international law that diplomatic agents do not enjoy as of right immunity from the payment of customs dues upon their property. According to Vattel,[4] among the rights which are not essential to the success of embassies there are certain ones which, though not based upon a general agreement on the part of nations, are nevertheless annexed to the representative character by custom in many countries. Such is the privilege by which ministers are exempted from the payment of import or export duties upon property which they bring into or send out of the country. There is no necessity for this exemption, since the payment of those duties would not render the minister less able to perform his functions. If the Sovereign is pleased to exempt him from them it is a courtesy, which the minister cannot claim as a right. It has been shown[1] that in early times in England, ambassadors were definitely regarded as exempt from duties on goods accompanying them or consigned to them. But this was a courtesy granted by the King, not an accepted privilege. When Parliament came to power, foreign ministers began to lose the privilege by which their wines were exempt from duty and taxation. Then in 1644, the Houses of Lords and Commons granted the Dutch Ambassador, as envoy-extraordinary, exemption from excise or customs duties on food, wine and other necessaries. In the next few years this was extended to other ambassadors. In Holland, however, foreign envoys had to pay customs duties on articles imported other than food. In Venice, they were not completely exempt. In France, exemption seems to have been based on reciprocity. In Spain occurred the well-known case of Thomas Chaloner or Challoner, the English Ambassador, who complained to Queen Elizabeth I that Spanish customs officers had opened and examined his baggage. The Queen demanded an explanation and threatened to withdraw Chaloner, but in the event she did not and the affair blew over.[2] Spain indeed became a paradise for ambassadors, and they frequently imported free of duty more than they required and re-sold the surplus. This profitable incident of the ambassador's office, known as his 'dispence', was abolished at the end of the seventeenth century. In the end, practice prevailed over theory, but it is doubtful if the entitlement of ambassadors to immunity from customs dues was ever fully accepted in western Europe. However, politeness and policy dictated that the ambassador should be treated with every consideration.[3]

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[1] Genet, op. cit., vol. iv, p. 448.

[2] Cf. this *Year Book*, 30 (1953), p. 150.

[3] Secretary of State to Chiefs of Mission in Washington, 12 October 1932 (cited by Hackworth, op. cit., vol. iv, § 407).

[4] Lib. IV, c. vii, § 105 (trans. in *Harvard Research*, p. 107).

That exemption from customs duties was not a rule of international law was noted by Phillimore,[4] who, echoing to some extent Vattel, includes among the 'privileges which the usage of nations has imparted to the ambassador, which are not derived from the reason of the thing' the fact that the ambassador is generally exempt from the payment of duties upon articles imported for the use of himself or of his family. (According to Roman law,[5] a legate paid duty on articles brought with him, but was exempt from duty on articles bought 'ex Romano solo' and sent home to his own country.) On the Continent, it has been argued[6] that as custom and other duties fall not upon the person but on the goods, they should be levied on all persons not specially exempt by the law of the land. Genet,[1] on the other hand, calls freedom from customs 'an integral part of the privilege of a diplomatic agent', which has survived to our day despite abuses constantly denounced. In 1922 an Italian Court appears to have held the opinion that freedom from customs, at least freedom from examination of baggage, was such an integral part of the privilege of a diplomatic agent that insistence by the customs on such examination proved that the owner of the baggage in question was not entitled to diplomatic status. The case concerned the Head of the Russian Commercial Mission to Italy, and the Court held that 'the absence from the Russian delegation of any diplomatic character could be inferred from the fact that while there is universally accorded to diplomatic agents the privilege of exemption of their baggage from any customs examination, the personal baggage of members of the Russian Commercial Delegation had been subject to customs examination at Rome Railway Station'.[2]

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[1] See Adair, op. cit., pp. 95–98.

[2] According to Vattel, op. cit., 1, 2, § 105 (*Si l'ambassadeur est exempt de tous impôts*), Queen Elizabeth told Chaloner that he would have to feign not to notice (*dissimuler*) anything which did not directly offend the dignity of his Sovereign. But Adair says (*ubi sup.*) that Vattel's version is wrong.

[3] Droin, op. cit., pp. 170–3, who calls exemption from customs a fundamental principle of diplomatic immunity and the basis of the inviolability of the papers of a public minister, cites cases of abuse of the right, cases of contraband sometimes on a large scale, but states that they are today rare.

[4] Op. cit., p. 210.

[5] Cod. 1. iv, t. 61, 8, cited by Phillimore, *ubi sup.*

[6] Dallos, *Répertoire*, art. Agent Diplomatique, vol. 3, §§ 140 ff.

This reasoning finds little support from the learned Editor of *Oppenheim*,[3] who states quite shortly: 'As regards customs duties, International Law imposes no obligation of exemption therefrom.' He adds: 'In practice, and by courtesy,[4] however, the Municipal Laws of many States allow diplomatic envoys, within certain limits, to receive free of duty goods intended for their own private use.' So far as the United Kingdom is concerned, the practice[5] is as follows. The customs privileges accorded to foreign diplomatic officers in the United Kingdom are of two kinds. The first kind is granted to all heads of mission in this country and consists of exemption from examination of baggage on first arrival and subsequently on production of a baggage pass, and delivery duty-free of imported packages for the personal use of the head of the mission and that of his family. The second kind is granted to certain countries on a reciprocal basis and extends to certain members of diplomatic staffs only, viz. counsellors, secretaries and attachés to embassies and legations. (No privileges are accorded to diplomatic officers below the ranks mentioned.) To these are granted exemption from examination of baggage on first arrival only, and delivery duty-free of imported packages for their personal use and that of their families. No quantitative restriction is placed on deliveries of imported dutiable goods to privileged officials, although it is expected that the quantities imported will not be so excessive as to amount to abuse of privilege.[1] Articles such as office furniture, stationery, and other supplies sent by foreign Governments for the official use of their representatives in this country are normally admitted without examination.[2]

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[1] Op cit., §§ 140 ff. Similarly, Bluntschli, op. cit., § 223, insists on the *franchise des douanes*, but he permits customs examination provided that the immunity of the hotel and of the diplomatic archives is respected.

[2] *In re Servante*, decided by the Court of Appeal of Rome on 20 May 1921 (*Monitore dei Tribunali*, 1922, p. 31; *Annual Digest*, 1919–1922, Case No. 211).

[3] Op. cit., vol. i (8th ed. by Lauterpacht, 1955), p. 803. (Cf. Fiore, op. cit., § 453.) At p. 803 is set out a summary of the practice in the United Kingdom. See also Satow, op. cit., § 414; Phillimore, op. cit., p. 20.

[4] Cf. Starke, op. cit., p. 287: 'the privilege is not conceded by International Law as of right, but is purely a matter of comity or reciprocity'. Satow, op. cit., § 414, calls it 'international courtesy, not a right'. Cf. Hall, op. cit., § 53 (cited *supra*, p. 306, n. 2). Fiore, op. cit., § 453, places freedom from customs duties among the rights and privileges considered as appropriate by international custom, and exemption of goods not under seal among those granted by *comitas gentium*. Cf. the Swiss Government's reply to Questionnaire No. 3, on Diplomatic Immunities, of the League of Nations Committee of Experts for the Progressive Codification of International Law (C.196.M.70.1927.V): '[Customs] prerogatives are granted out of courtesy. Their extent is in the discretion of the governments concerned, subject to reciprocity.'

[5] But not the law. 'The English authorities are silent on the subject of [a public minister's] liability to pay customs duties and similar imposts.' (Halsbury, *Laws of England*, vol. vii (3rd ed., 1954), p. 270). And note that taxes on the importation of goods are excluded from the taxes exemption from which is accorded by the International Organizations (Immunities and Privileges) Act, 1950 (see *supra*, p. 310).

The comment has been made[3] that the payment of customs duties on articles imported for the personal use of a diplomatic person 'could never be enforced'. This comment is, however, with respect, thought to be mistaken; in most cases the dutiable goods could, if necessary, be held by the revenue authorities until the duty had been paid. It is possible, moreover, that the duty could be enforced when the goods had passed out of the possession of the diplomatic person. Thus, in the old case of *The Attorney-General* v. *Thornton*,[4] an information was laid charging the defendant, an auctioneer, with being indebted to the Crown for 'moneys duties of customs' on spirits imported into Great Britain duty-free for the use of the Portuguese Ambassador (who had left the country on the termination of his mission). The defendant had been employed by the Ambassador's agent to sell the spirits by public auction, which he had done without paying the customs duties (although he did pay the excise duty). For the defendant it was contended that the wines were protected by the privilege conferred on the Ambassador by the Statute of Anne both from liability to duty and from process to enforce payment. Hence the defendant, who had been employed by the Ambassador, could not be liable to be sued by the Crown for duties chargeable on the importation of the spirits. For the Crown, it was argued that the object of the Statute of Anne was solely to protect the goods of foreign ministers from legal process while the goods were still their property and in their possession, and whilst the foreign minister remained in office and retained his diplomatic character. As soon as the Ambassador parted with his property in the goods and transferred the right of possession in them, or retired from office, duties attached on the goods, and the liability to pay followed them, *quasi in rem*, into whosesoever hand they should come, the duties being charged on such persons as importers. (Pausing here, there is a clear admission by the Crown that the wines are not liable to duty while they are in the Ambassador's hands; put another way, an ambassador is exempt from duty on importing wines.) Otherwise, it was contended, any foreign minister in the country might derive an incalculable advantage from a lucrative traffic in customable commodities, without being subject to duties payable by other importers. The defendant, in reply, argued that if the wines were not liable to duties as belonging to a foreign ambassador and if the principle had not been meant to extend to entitle ambassadors to dispose of their goods duty-free under the protection of the privilege, it was a defect in the law, a *casus omissus* from an oversight on the part of the legislature of the day. As to the liability of the defendant in the present case, it was pointed out, the wines had remained in the cellars of the Ambassador while the sale was taking place. The Court held, first, that customs are payable on the wines of an ambassador when sold on his account after he has retired from the service of his State in this country, and, secondly, that the liability of wines to payment of duty revived on their passing from the hands of the Ambassador to a third person by a sale [meaning presumably at any time during the Ambassador's tenure of office].[1]

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[1] It appears, however, that limits are placed on the amount of wines, spirits and tobacco which are admitted free of duty: *Harvard Research*, p. 110. See also the International Organizations (Immunities and Privileges) Act, 1950, s. 1 (2) (*a*) and Schedule, Part I, under which the immunities that may be conferred include exemption from taxes on the importation of goods imported for official use of the organization or for exportation, and of publications of the organization, subject to compliance with such conditions as may be prescribed by the Commissioners of Customs and Excise, and exemption from prohibitions and restrictions on importation or exportation of goods for official use and on publications of the organization. The immunities may be withdrawn if reciprocal treatment is refused (ibid., s. 5).

[2] I am indebted to the Protocol Department of the Foreign Office for this information regarding customs facilities for foreign diplomatic officers. It has been stated in Parliament that customs privileges and facilities which are ordinarily accorded to diplomats appointed to the United Kingdom are, in general, considerably wider than those granted to members of Her Majesty's Foreign Service in the Soviet orbit. The discrepancy is greatest in the case of Roumania. See *Hansard*, 19 March 1952, col. 2298.

[3] See Brierly, op. cit., p. 201.

[4] (1824), 13 Price 805.

With the United Kingdom practice may be compared the Instructions to Diplomatic Officers of the United States, 1927:[2]

> 'It is common usage in international intercourse that to a diplomatic representative should be conceded the privileges of importation of effects for his personal or official use or for the use of his immediate family, without payment of customs therefor . . . . The practice of the United States is to accord such privilege to chiefs of mission and on a reciprocal basis to members of their staff. In the case of mail parcels, sealed or unsealed,

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[1] The learned Editor of *Price's Reports* observes (at p. 819) that 'the very serious difficulties raised in this case do not appear to have been so completely overcome by the determination as to render the decision . . . a conclusive obviation for the future of the doubts raised by the main question.'

[2] Ch. viii, s. 12; cited in *Harvard Research*, p. 107. See also Instructions to the Diplomatic Agents of the United States, 1885, § 55: 'The diplomatic privilege of importing goods for personal use is not accorded to the Secretary of Legation.' (Cited ibid., p. 112.)

addressed to members of the family of the chief of mission, members of the diplomatic staff or their families, custom inspection is insisted on, even where admission is granted free of duty.'

In fact, diplomatic agents accredited to the United States of America receive a number of concessions of customs, providing that their own Governments accord like privileges to corresponding officials of the United States. Thus, imported articles for the use of the Embassy—costumes, regalia, office supplies and equipment are allowed in free of duty. Articles intended for the 'personal or family use' of members and attachés of foreign embassies and legations are admitted under special agreement with the Government which they represent. Baggage and effects of ambassadors, ministers, chargés d'affaires, secretaries, attachés, and so on, and their families, are admitted free of duty on a basis of reciprocity, but this does not extend to alcoholic beverages. Parcels arriving by mail addressed to diplomatic agents are subject to customs examination, but are admitted free of duty. Packages arriving otherwise than by mail and addressed to the chief of mission are admitted free of duty and without customs examination. The Customs reserve the right to examine such packages addressed to subordinate members of missions and their families, but in practice the packages are invariably passed without inspection. Finally, packages bearing the official seal of a foreign Government, certified to contain only official communications or documents, are admitted free of duty and without customs examination.[1]

Indeed, it may be laid down as a general rule that the declaration of any diplomatic person that a sealed package contains official papers connected with his mission is usually accepted. If examination is insisted upon on a suspicion of fraud, it will be made on the responsibility of the receiving State, who will be liable to make reparation should the suspicion be found unjustified.[2]

It seems clear that most countries allow free entry for articles destined for use in a foreign embassy, or for the use of the ambassador and his family, members of his staff, and their families; it is equally clear that this is a concession originally resting upon courtesy or comity, and in nearly all cases it is dependent on reciprocity. There is, however, wide divergence between the laws of the various States on this subject, both as to the classes of members of a diplomatic mission who are granted exemption and as to the kind and value of articles in respect of which the exemption is granted. There is also wide variation from State to State in the way in which customs formalities are modified or waived in connexion with the grant of exemptions (usually upon application by the head of mission to the Foreign Office of the receiving State).[1] In fact, the one 'universal rule' given by Satow[2] is the rule that the movable property of a deceased envoy can be re-exported without payment of customs dues (known as *droits d'extraction*).

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[1] Customs Regulations, 1937, Article 432. (For sealed packages apparently containing only documents for members of foreign countries see Article 361.) See Hackworth, op. cit., vol. iv, § 410. As to alcoholic liquors, see ibid., pp. 597–611. See also Treasury Regulations (Customs Regulations of 1923), cited in *Harvard Research*, p. 111.

[2] *Harvard Research*, pp. 112–13. Cf. Satow, op. cit., § 414: Packages under the seal of the Foreign Office addressed to heads of mission are ordinarily passed without examination or other formality. Fiore, *International Law Codified* (1890), trans. Borchard (1918), § 453, enumerates the free entry of packages sealed with the seal of the envoy's home Government among the 'rights and privileges considered as appropriate by international custom'.

Despite the variations mentioned, however, and although the exemptions are by no means essential for the successful functioning of a mission, the practice of granting them is now so widespread and so firmly established[3] that one might be tempted to ask whether the custom of granting concessions has not hardened into a rule of law.[4] On the other hand, it is difficult to see how it can justly be asserted that liability to pay customs dues is a hindrance to a diplomatic representative, and, that being the case, the exemptions must be regarded as being still what they originally were—concessions based on international comity or courtesy.

6. *Local taxation licences*

With regard to local taxation licences, such as the duty on possessing firearms or dogs or employing male servants, Satow[5] states that diplomatic persons enjoy exemption as a matter of courtesy. Motor-cars required for the personal use of the head of mission and his family are, according to Satow, not liable to duty; cars belonging to other members of the mission are exempt 'on certain conditions'. As regards motor-car licence duty, all members of the diplomatic corps (except menial servants) are exempted from payment of both this duty and the fee payable on the issue of motor driving licences.[1]

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[1] See *Harvard Research*, p. 110. At p. 117 is set out a list of some fourteen countries and the relevant legislation in each. A typical example is the Swiss Federal Customs Law of 1 October 1926, Article 14 of which exempts the official property of missions and such articles as official printed material, insignia and flags. A Decree of the Federal Council dated 21 September 1927 made this provision conditional on reciprocity. (Hill, op. cit., p. 258, cites an anonymous case of 1841 in which an ambassador was held exempt from the tax payable on the importation of French wines.)

[2] Op. cit., § 491.

[3] See, however, *Harvard Draft*, § 21: 'Prohibited goods. The receiving State may refuse to permit a member of a mission . . . to bring into its territory articles the importation of which is prohibited by its general laws; or to take out of its territory articles the exportation of which is prohibited by its general laws. . . .' 'The introduction of intoxicating liquor into the United States by foreign diplomats is contrary to law': *Attorney Generals of United States*, cited in *Harvard Research*, p. 114. And see Preuss in *Revue de droit international et de droit comparé*, 3rd series (1932), pp. 184–222, and in *Michigan Law Review*, 30 (1931–2), pp. 333–48. According to Fiore, op. cit., § 453, customs authorities will pass without inspection goods which a diplomatic agent declares are neither prohibited nor imported for commercial purposes.

[4] Cf. *Washington Project*, § 24: 'Diplomatic agents shall be exempt in the country where they are accredited . . . (3) from customs duties on objects destined for their personal use and that of their family up to a sum determined by the government of the country to which they are accredited.' Cf. also the Resolution of the Institute of International Law, § 11: 'The minister and his subordinates and their families are exempt from . . . customs duties on articles for personal use' (cited in *A.J.* 20 (1926), Special Suppl., p. 155).

[5] Op. cit., p. 400.

In the United States of America, diplomatic licence plates are issued free in the District of Columbia to members of the diplomatic corps in Washington and their families. Charges for licence plates and the tax on motor-cars are waived, while drivers' permits are issued free 'as an act of courtesy and on a reciprocal basis'.[2] In an action for damages arising out of a motor accident in the United States, the Supreme Court of the State of New York[3] held that by obtaining a licence to own and operate a motor vehicle in the State of New York, the defendants, the Chilean Ambassador Extraordinary and Plenipotentiary, Permanent Representative to the United Nations, and his wife, 'must be deemed to have assumed in connection with such privilege, the burdens thereof'. In other words, an envoy does not need to hold a motor-car licence, but if he does obtain one he must be deemed to have waived his immunity from the jurisdiction of the local courts. This remarkable decision was reversed on appeal six weeks later.[4]

III. *Freedom of movement*

A question of interest which appears but rarely, if at all, to have been raised in the authorities is whether among the immunities and privileges which ought to be granted to diplomatic envoys is that of freedom of movement. It is submitted that in general there is no such right.[5] This submission is drawn not only from the absence of mention of such a right, but also from principle. The duty of the receiving Government is to accord to diplomats freedom from *coactio*, that is, freedom from interference with the exercise of their function. Now, the principal functions of permanent envoys comprise negotiation, observation (of occurrences which might affect their home States), and the protection of the subjects of their respective home States.[1] These, except perhaps observation, can be performed at the seat of the Government to which the envoys are accredited. It may be, therefore, that all that an envoy is strictly entitled to demand is freedom of movement between his embassy or legation and the Foreign Office through which he must communicate to the Head of State. And that is no more than part of the right of access which again is an integral part of the active right of legation possessed by the sending State.[2] The same may be said of the right to enter the country and travel to the seat of its Government. (If on his journey from his own State to the State of his destination an envoy has to travel through the territory of a third State which is at peace with both the sending State and the receiving State, then the third State must grant the right of innocent passage (*jus transitus innoxii*) to the envoy.)[3] There is doubt, however, whether there is an absolute right to leave the country on the termination of an envoy's mission. When an envoy is recalled, 'he enjoys nevertheless all his privileges on his homeward journey',[4] whether the recall is brought about by a rupture of diplomatic intercourse on the outbreak of war[5] or by any other cause. And it is said[6] that envoys cannot be prevented from leaving the country for not having paid their debts; but it is at this point that the doubt arises. In 1772 the Baron de Wrech, Minister of Hesse-Cassel at Paris, was about to leave France when local tradesmen to whom he owed money applied to the Ministry of Foreign Affairs for assistance. The Minister responded by refusing to give the Baron his passports until the matter was arranged. The whole diplomatic corps protested against this act as a violation of international law, but M. D'Aiguillon, the French Minister of Foreign Affairs sent a *Mémoire* to the Corps in which he defended his

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[1] Oppenheim, op. cit., p. 804, n. (Satow, op. cit., p. 414, appears to restrict the exemption to the head of the mission, senior counsellors, and the naval, military and air attachés, other members of the mission receiving a 50 per cent. rebate, and all this on condition of reciprocity.) In ibid., p. 801, a footnote asserts that 'In the United Kingdom every person possessing diplomatic immunity and holding a motor-car licence must be insured against third-party risks. For the application of that practice see *Dickinson* v. *Del Solar*, [1930] 1 K.B. 376.' In that case, the defendant, the First Secretary of a Legation in London, was indeed insured against such risk, but there is no indication in the report that it is either usual or compulsory for diplomatic persons to be so insured. See, however, *Parker* v. *Broggan*, [1947] 1 All E.R. 46, *per* MacNaghten J: 'So meticulous in such matters are members of embassies in the country that I think I am right in saying that all of them undertake the obligation of taking out third-party insurance with regard to their motor cars, although, if they could be said to be negligent, they could not be sued. If there is an accident, I do not think that any foreign embassy seeks to raise the question of immunity. They allow the question of liability to be determined.'

[2] Hackworth, op. cit., vol. iv, § 585.

[3] Special Term, Nassau County, Part II, 5 November 1948; see *Friedberg* v. *Santa Cruz* (84 N.Y.S. 2nd 148; *Annual Digest*, 1948, Case No. 103).

[4] By the Appellete Division of the Supreme Court of the State of New York, 31 January 1949: 247 App. Div. 1072; 86 N.Y.S. 2d 369; *Annual Digest*, 1949, Case No. 100.

[5] In the Exchange of Letters in 1946 between the President of the International Court of Justice and the Minister for Foreign Affairs of the Netherlands (see *supra*, p. 314), there is a provision (Appendix, para. 5): 'The assessors of the Court and the agents, counsel and advocates of the parties, shall be accorded such privileges, immunities and facilities for residence and travel as may be required for the independent exercise of their functions.' See *I.C.J. Yearbook*, 1946–7,

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p. 90. See also the Resolution adopted by the General Assembly on 11 December 1946, concerning the privileges and immunities of the members, Registrar, officials, &c., of the Court. It recommends, *inter alia*, that Judges should be accorded every facility for leaving the country where they may happen to be, for entering the country where the Court is sitting, and again for leaving it; and that officials of the Court should enjoy in any country where they may happen to be on the business of the Court, or in any country through which they must pass on such business, such privileges, immunities and facilities for residence and travel as may be necessary for the independent exercise of their functions. (*Journal of the United Nations*, No. 75 (General Assembly), Suppl. A.–64, Add. 1, p. 933, set out in *I.C.J. Yearbook*, 1946–7, pp. 91–92.)

[1] See Oppenheim, op. cit., §§ 378–82.

[2] Ibid., § 360. But wide freedom of movement will greatly facilitate the envoy's performance of his duties.

[3] Ibid., § 398. Cf. Satow, op. cit., §§ 424–36.

[4] Oppenheim, op. cit., § 409.

[5] Ibid., § 413. Cf. Satow, op. cit., §§ 487–90; Hall, op. cit., § 50.

[6] Oppenheim, op. cit., § 391, where a version of the case of Baron de Wrech next related is used to support this dictum. But the fuller version here given is evidence in the contrary sense.

action, citing a number of precedents to justify his action—for example, that 'In Russia a public minister is bound to announce his departure by three advertisements'.[1]

In connexion with the question of the freedom of an envoy to enter and leave the country to which he is accredited, it is of interest to examine the record of English legislation for the control of the movements of aliens. The first of the modern statutes for this purpose was the Aliens Act of 1816,[2] the principal effect of which was to oblige aliens to depart this realm on proclamation made. Section 15 of the Act provides, however, that it is 'not to affect any foreign Ambassador or other Public Minister duly authorised nor any Domestic Servant of any such foreign Ambassador or Public Minister registered as such according to the direction of the Laws[3] in force for that purpose or being actually attendant upon such Ambassador or Minister'.

A similar exception is contained in the Act of 1826,[4] which provided (with what success is not known) 'for a complete Register of all Aliens in the Realm' and required them to declare their residence on arrival and half-yearly thereafter, and in the Act for the Regulation of Aliens, 1836,[5] which provided that an alien on arrival from abroad should produce his passport and make a declaration showing to what country he belonged and from whence he came, under a penalty of £2. The Aliens Act, 1905, which repealed the Act of 1836 and gave the Crown power to prevent the landing of, and to expel, undesirable aliens, contained no such exemption in favour of diplomatic envoys. Nor did the Aliens Restriction Act of 1914, which was 'to enable His Majesty in time of war or imminent danger or great emergency by Order in Council to impose restrictions on aliens and make such provisions as appear necessary or expedient for carrying such restrictions into effect'. Possibly the parliamentary draftsmen felt that the question of the control of movement of diplomats was a matter which could be left to the Executive, whose province it was. And in the Aliens Restriction Order, 1914,[6] made under the Act, we find that Article 30 provides that nothing in the Order shall be construed as imposing any restriction or disability on any foreign ambassador or other public minister duly authorized, or any servants in actual attendance upon such ambassador or public minister—the last few words are an obvious echo of the language of the Statute of a century before. Again, Section 14 (1) of the Aliens Restriction

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[1] Martens, op. cit., vol. ii, pp. 282–4; cf. Hurst, op. cit., p. 176; Hall, op. cit., § 50.

[2] 56 Geo. III, c. 86, repealed by the Act of 1826 next mentioned.

[3] E.g., the Statute of Anne, 1708. Apparently, registration *or* actual attendance sufficed.

[4] 7 Geo. IV, c. 54 (since repealed).

[5] 6 and 7 W. IV, c. 11.

[6] S.R. & O. 1914, No. 1161, dated 5 August 1914. Revoked and re-enacted with amendments in the Consolidation Order, 1914, S.R. & O. 1914, No. 1374, where Article 30 of the original Order reappears as Article 33.

(Amendment) Act, 1919, to continue and extend the provisions of the 1914 Act, provides that nothing in the Act contained shall be construed as imposing any restriction or disability on any duly accredited head of a foreign diplomatic mission or any member of his official staff or household. The restrictions and disabilities imposed by section 1 of the Act are numerous and range from registration of persons, limitation of movement and places of residence, to powers of arrest, detention, and search.

At the outbreak of war in 1939 the law respecting aliens in the United Kingdom was for the most part contained in the Aliens Order, 1920,[1] which was made under the Act of 1919 and which, as from time to time amended, formed a code of restriction and control of aliens.[2] The wording of Article 22 (1) of this Order follows that of section 14 (1) of the Act, with, however, a proviso[3] that the Secretary of State may direct that all or any of the powers of the Aliens Order should have effect in relation to all or any of the persons mentioned in the Direction, that is, ambassadors, ministers, and their families, and so on. This power of direction was reinforced at a critical period during the Second World War by an Order[4] made under the Emergency Powers (Defence) Acts, 1939 and 1940, which added a new Regulation 20A to the Defence (General) Regulations, 1939;[5] it provided that notwithstanding section 14 of the Aliens Restriction Act, 1919, or any other enactment or any rule of law, any provision might be made by an Order in Council with respect to heads of foreign diplomatic missions and members of their households and staffs which could be made with respect to any other alien. In furtherance of this provision the Aliens Order, 1944,[6] was made enabling the Secretary of State to direct the provisions of the Aliens Order, 1920, to be applied to diplomatic envoys, and a Direction[7] was accordingly given on 17 April 1944 making applicable to envoys those provisions of the Aliens Order which, *inter alia*, restricted the landing, embarkation, inspection and detention of aliens.[8] In effect, the departure from this country of official couriers and consular or diplomatic representatives and their staffs was suspended. These restrictions, which were clearly part of the intensified security restrictions imposed in this country during the weeks prior to the invasion of Europe, were removed on 19 and 20 June 1944.[9]

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[1] S.R. & O. 1920, No. 448. For a fuller account of these matters, see Schwelb in *Modern Law Review*, 7 (1944), pp. 223–7.

[2] It has been revoked and replaced by S.I. 1953, No. 1671, which came into force on 1 April 1954.

[3] Added by S.R. & O. 1944, No. 465, dated 7 April 1944.

[4] S.R. & O. 1944, No. 463.

[5] S.R. & O. 1939, No. 927.

[6] S.R. & O. 1944, No. 465.

[7] Ibid., No. 482.

[8] See *infra*, p. 337, for other provisions affecting diplomatic envoys. It appears that the American and Soviet Missions and those of the 'fighting Dominions' were exempt from these restrictions (see *The Times* newspaper of 18 April 1944)—but in any event, citizens of the Dominions are not aliens.

[9] By S.R. & O. 1944, No. 701. See also S.I. 1951, No. 966, Article 17(A).

To bring the Aliens Order, 1920, in line with then current legislative provision for diplomatic immunity, a Direction[1] given in 1945 exempts from the provision of the Aliens Order any person for the time being entitled to immunity from suit and legal process specified in paragraph 1 of Part II of the Schedule to the Diplomatic Privileges (Extension) Act, 1944, and his wife and children of any age living with him. As the paragraph in question accords the like immunity from suit and legal process as is accorded to an envoy of a foreign Power accredited to Her Majesty, and his officers and servants, the Direction is seen to contain a very roundabout reference to ambassadors, ministers, and their staffs.[2]

Mention should be made of the question whether an envoy has a right freely to move about the territory of the State to the Government of which he is accredited. On principle, again, he would appear not to have such a right, but that he should be allowed to do so is part of the accepted courtesies of diplomatic intercourse. The imposition of a restriction on free movement is, moreover, probably an unfriendly act and may become a ground for retorsion.[3]

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[1] S.R. & O. 1945, No. 1054, dated 10 August 1955.

[2] See now the Aliens Order, 1953 (S.I. 1953, No. 1671), which by Article 24 (1) thereof 'does not apply to any person being an envoy of a foreign sovereign Power accredited to Her Majesty, or a member of the household or official staff of such an envoy, or being entitled to the like immunity from suit and legal process as is accorded to such an envoy'.

[3] In 1950 and 1951 a number of States imposed travel restrictions on diplomats accredited to them. E.g. Roumania, where diplomats were confined to Bucharest (*The Times* newspaper, 13 June 1950); Yugoslavia–exclusion from certain frontier districts (ibid.); Hungary–members of all foreign legations restricted to a radius of 30 kilometres from the centre of Budapest, permission to travel beyond this limit being granted by the Foreign Ministry only for 'adequate reasons', which included, however, vacation trips to popular resorts (ibid., 19 January 1951); United Kingdom–Hungarian Minister, all Hungarian members of his staff and their dependents, as well as visiting members of the Hungarian Foreign Service, required to obtain permission from the Foreign Office for all journeys beyond a distance of 18 miles from Hyde Park Corner. Permission to be refused if the administration of corresponding limitations in Hungary rendered this desirable (ibid., 6 February 1951; *Hansard*, 5 February 1951, cols. 1340–1, Written Answers, p. 163); France–Hungarian diplomats not allowed to travel outside the limits of the Departments of the Seine, Seine-et-Marne and Seine-et-Oise, Paris and its environs without a permit granted, on 48 hours' notice, by the Foreign Ministry (*The Times* newspaper, 6 February 1951: 'These restrictions are made in consequence of the tightening up of measures restricting the movement of French Diplomats in Hungary. Similar restrictions exist in Roumania, Albania and Bulgaria. In Czechoslovakia, there are practically no restrictions on movement, while in Poland and in Russia itself these are much less severe than in the three satellite countries concerned. The Hungarian Government was given four days by the Quai d'Orsay to revoke its latest order. As it showed no willingness to take action, the French Government announced parallel measures.') Restrictions were shortly afterwards imposed by the French Government on Bulgarian, Roumanian and Albanian envoys in Paris (ibid., 12 February 1951); Italy–the representatives in Rome of Bulgaria, Roumania and Hungary forbidden to travel without special permission in a limited, though extensive, area in the neighbourhood of Rome (ibid., 4 October 1951).

In March 1952 the process was revived. On 10 March the British Government imposed travel restrictions on the Soviet Ambassador and the Roumanian Minister and their staffs and on the staff of the Bulgarian Minister (he himself being exempted because the British Minister in Sofia was exempt from similar Bulgarian restrictions). These diplomatic persons were not to travel more than 25 miles from Hyde Park Corner without notifying the Foreign Office 48 hours

Cognate with the right of freedom of movement is the duty and the right of a diplomatic envoy to move when the Government to which he is accredited changes its location. In 1914, at the time of the German invasion of Belgium, the Belgian Government removed from Brussels to Le Havre, in France. The majority of the Diplomatic Corps accompanied them,[1] but the Spanish and American Ambassadors remained in Brussels. According to one account,[2] the German Press of the day criticized the action of these two Envoys on the ground that a foreign diplomatic representative has no right to remain in a country which has fallen under the military occupation of the enemy and from which the Government to which he is accredited has withdrawn. This appears to be a just criticism. A State's right of legation is exercised through its Head,[3] and diplomatic envoys are accredited to Heads of States, to 'Courts', or to Governments, and not to States as such:[4] and when the Head of State and the administration move from the normal seat of government, the envoys should move with them.[5] Although there

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in advance. Soviet officials were allowed to travel to their Embassy's country house or club in Kent by a regular route without giving notice, a concession granted because British officials in Moscow were allowed to visit Tolstoy's tomb and a monastery near Moscow. This was thought to be a suitable act of reciprocity. Travel on normal journeys throughout Britain was permitted so long as the diplomatic persons mentioned notified the Foreign Office in advance. The whole of the Soviet Union east of a line Archangel–Astrakhan, all frontiers, all coastal districts except Leningrad and Odessa, and the larger industrial towns, were said to be out of bounds to British diplomats (see *The Times* newspaper, 11 and 17 March, 1952, and *Hansard*, 19 March 1952, cols. 2297–8, where a long statement on travel restrictions on diplomats is printed). Other countries imposed restrictions in March 1952 as follows: United States of America–all members of the Russian Embassy and their families (but not those belonging to the Russian Mission to the United Nations); France–Soviet diplomats not allowed to travel outside the Departments of the Seine, Seine-et-Marne and Seine-et-Oise, nor to enter the area around Supreme Allied Headquarters at Versailles and that of Allied Armies, Central Europe, at Fontainebleau; Holland–Russian, Hungarian, and Roumanian Heads of Missions and staffs restricted to travel within the provinces of South Holland and North Holland up to the North Sea Canal; Italy (1 April)–Soviet Embassy staff restricted to a 30-mile radius around Rome except for a named winter sports centre (*The Times* newspaper, 11 March 1952); Turkey–staffs of the Soviet, Roumanian, Bulgarian and Hungarian Missions to give 24 hours' notice of intention to travel beyond 25 miles from their place of residence, with particulars of destination and length of proposed stay. These restrictions were expressed to depend on similar restrictions imposed on Turkish diplomatic representatives (ibid., 17 March 1952). It is noteworthy that no protest on the part of any of the States affected has been recorded.

[1] In Genet, op. cit., p. 494, is a letter, dated in November 1944, concerning the presence at Le Havre of the Turkish Minister to Belgium.

[2] See Garner, *International Law and the World War* (1920), vol. i, § 38. On the outbreak of war between the United States and Germany in 1917, the American Ambassador went not to Le Havre, but to Berne (Switzerland).

[3] See Oppenheim, op. cit., § 362.

[4] The letters of credence which an ambassador brings on taking up a new post are addressed to the monarch or his representative (Martens, *Guide diplomatique* (1854) p. 66), although a chargé d'affaires is accredited to the Minister of Foreign Affairs (Satow, op. cit., § 487). Letters of credence expire on the death of the sovereign to whom they are addressed, and new credentials are required (Martens, op. cit., pp. 68 and 202), as also on the deposition or abdication of the sovereign (but not of a president) (Satow, op. cit., § 487). See also Hackworth, op. cit., pp. 395–6.

[5] In 1915, on the occupation of Bucharest by the Central Powers, the Roumanian Government moved to Jassy. The diplomatic representatives of neutral States, however, remained in Bucharest, but the occupation authorities required them to leave the capital on the ground that 'international law does not recognize the status of diplomats accredited to a government which is under the

seems to be no express authority on the subject, (it seems logical to expect diplomatic representatives to follow the Government with which they transact their official business when that Government is forced by stress of circumstances to move its headquarters.) And although it may be doubted whether a Government has any right to dictate exactly where foreign missions are to take up their residence, it is thought they they must reside at some place where it is reasonably possible to transact business with them. In earlier times, difficulties of communication and transport would often have rendered it impossible to transact business unless the missions were in the same town as the Government to which they were accredited. In these days, there might be less objection to an embassy and embassy offices being situated away from the seat of government, provided that the members of the mission were willing and able to travel quickly and at short notice to the seat of government whenever necessary. But that safeguard there must be. Again, if foreign missions are under a duty to locate themselves at or near the capital, and to follow the local Government when it removes from the capital, there is, it is submitted, a correlative right for those missions to accompany the local Government. A foreign State which has the active right of legation is entitled to maintain that its diplomatic mission cannot adequately fulfil its functions unless the mission is in the same place as the local Government. Conversely, when a State in the exercise of its passive right of legation receives a diplomatic mission into its territory, it is bound to allow that mission to discharge its functions and to accord it the necessary facilities for so doing.[1]

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military occupation of an enemy power'. The envoys were, however, allowed to join the Roumanian Government in Jassy. (Garner, *ubi sup.*)

When the French Government moved temporarily to Bordeaux in 1914, on the threat of a German occupation of Paris, all embassies and legations followed them there, except the American Ambassador, who cabled his Government for permission to remain and was instructed to use his discretion. (Garner, *ubi sup.*)

During the Second World War a number of Heads of States with their Governments came to the United Kingdom, and envoys of States with which they maintained friendly relations followed them: see Oppenheimer, 'Governments and Authorities in Exile', in *A.J.* 36 (1942), p. 568. At one time there were in London no fewer than eight Diplomatic Corps besides that accredited to the Court of St. James's. The Diplomatic Privileges (Extension) Act, 1941, ss. 1 and 2, provided for the extension of diplomatic privilege to envoys of foreign Powers accredited to other Powers or Provisional Governments for the time being established in the United Kingdom. In 1940, when the French Government moved to Bordeaux and then to Vichy, diplomatic representatives of Allied and neutral Governments followed it. When the Soviet Government moved from Moscow to Kuibyshev in face of the German threat to the capital in 1942, the diplomatic representatives went also. (As regards the Free French National Committee established in London, see Flory, *Le Statut international des Gouvernements réfugiés, 1939–45* (1952), p. 65. It may be that some States sent envoys to the Committee—at least the Committee prepared to receive them by providing that representatives of foreign Powers should be accredited to the Chef des Français Président du Comité National: see Article 6 of Ordonnance No. 16 in *Journal Officiel* (London), No. 11, 14 October 1941 (cited in Oppenheimer, *ubi sup.*, p. 477). But the whole subject lacks documentation.)

[1] I have to thank Sir Gerald Fitzmaurice, K.C.M.G., Legal Adviser to the Foreign Office, and the Protocol Department, for much of the material in this paragraph.

IV. *Freedom of communication*

In contrast to the topic of freedom of movement, the privilege of freedom of communication is one on which there is no lack of authority. Of the privileges due to diplomatic envoys and their need to enjoy such privileges for the perfect exercise of their functions, it is said in Oppenheim:

> 'It is . . . clear that if their full and free intercourse with their home States through letters, telegrams, and couriers were liable to interference, the objects of their mission could not be fulfilled. In this case it would be impossible for them to send independent and secret reports to, or receive similar instructions from, their home States.'[1]

It is perhaps not too much to say that the privilege of freedom of communication is one of the most vital of those required by and accorded to envoys. It enables them to receive instructions from their sending State and to send home reports of what they have done, said, and observed. The privilege consists of the transmission without delay of the envoy's communications and the immunity of those communications from any form of censorship. The communications may be sent by post or telegraph—and in the latter case it is essential that the envoy be free to use code if he so desires, any local regulation to the contrary notwithstanding. The communications may also be sent in the diplomatic bag[2] by courier; and the courier must enjoy a degree of freedom of movement similar to that of the ambassador himself. The privilege is in fact that of the ambassador, and it attaches to his messenger because it is necessary for the interest or convenience of the ambassador that his messages pass freely and without delay. Hence messengers and couriers are said to be entitled to safe conduct and to freedom from interference with their persons or dispatches.[3] When bearing official dispatches to and from foreign embassies, they are exempt from local jurisdiction even in third countries which they may have to traverse in the performance of their duties. They are usually provided with special passports, and their luggage containing diplomatic dispatches sealed with an official seal must not be opened and searched.[4]

The immunity of couriers and dispatches from all interference is of long standing, although in the sixteenth and seventeenth centuries the rule appears to have been one of theory; in practice, the examination of dispatches passing between an embassy and its home State was so tempting, and often so rewarding, that it was carried out as often as it could be done with safety.[1] In later years, however, there seems to have been a general change of heart. Writing in 1758, Vattel points out that couriers and the papers which they carry belong essentially to the ambassador and 'doivent par conséquent être sacrées. Si on ne les respectoit pas, l'ambassade ne sçauroit obtenir sa fin légitime, ni l'ambassadeur remplir ses fonctions avec la sureté convenable.'[2] Whether the form of this statement of the law comports a measure of protest at its non-observance in practice is not clear, but a hundred years later Phillimore finds no need to use so strong a term as 'sacrées'. He is content to point out that the right of inviolability extends to whatever is necessary for the discharge of ambassadorial functions so that the private effects, and above all the papers and correspondence, of the ambassador are inviolable;[3] in particular, the ambassador's correspondence cannot be opened and inspected by officials of the receiving State.[4] He cites, however, a French author[5] who expresses himself as emphatically as Vattel:

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[1] Op. cit., vol. i, § 385. In earlier editions of this work, the first sentence above-quoted ran: 'Liability to interference with their full and free intercourse with their home States through letters, telegrams and couriers would wholly nullify their *raison d'être*.' The present reading suggests an emphasis on the functional aspect of diplomatic immunities. In § 386, the privilege is treated as a special protection which must be extended to the intercourse of diplomatic envoys with their home States by letters, telegrams and special messengers.

[2] See Satow, op. cit., § 324.

[3] Cf. Halsbury, op. cit., p. 273, where it is said that 'there is no express authority for this in English law'.

[4] See Satow, op. cit., § 323.

> 'On regarde donc l'ouverture des lettres en temps de paix, de quelque manière qu'elle s'exécute, comme une violation du droit des gens, mais la plus odieuse et la plus honteuse contravention à la foi publique, c'est qu'un gouvernement souffre lui-même un tel abus dans ces bureaux de poste qui ont reçu les lettres avec la taxe sous le sceau du secret.'

The limitation in the passage above quoted to time of peace is worthy of note. As will be seen, in time of war there appears to be a tacit but established right to withdraw the privilege of freedom of communication.[6]

In the present century, another French writer, Genet,[7] takes a pessimistic, but dispassionate, view of the working of this privilege of communication. For messages sent by normal post, normal secrecy is guaranteed. But he cites a letter from King Leopold I of the Belgians to Queen Victoria which shows that his letters to Berlin were being opened and read by the Prussian police,[8] and while he calls such practices 'a criminal attempt against the dignity of the State to or by whom the correspondence is addressed', he admits that violations of the secrecy of diplomatic mail are frequent.[9]

It is interesting to note the views of two other twentieth-century authorities on the privilege of freedom of communication. Hatschek[10] bases it firmly on the international representative character of ambassadors, which is 'restricted to rendering officially effective within the receiving State action originating in the foreign country'. The admission of ambassadors to a State's territory is a derogation from the 'negative aspect of the territorial sovereignty', that is, from the right to exclude any other sovereign entity from the territory. That involves the recognition as immune from seizure by the receiving State of everything necessary to the rendering operative within that receiving State of acts of sovereignty originating abroad, that is, in the territory of the sending State, and in particular the recognition of the immunity of diplomatic correspondence. This theory covers only communications from the sending State to its ambassador abroad, but we must obviously read it as extending also to acts of sovereignty of the sending State performed within the territory of the receiving State, and so covering immunity from seizure of communications from the ambassador to his home State. Hatschek's rule, however, in one respect does not go far enough. It mentions only the seizure of diplomatic correspondence, not the subjecting it to censorship or delay, either of which can defeat the 'act of sovereignty'. In another respect it may be thought to go too far in that it is too rigid and makes no allowance for relaxation in time of war. But fundamentally it is a sound rule, based on international law and not merely on custom and usage; based, moreover, on what is 'necessary to the rendering operative' of the functions and duties of diplomatic envoys. To refuse them necessary immunities would be tantamount to *coactio*, hindrance, which can be justified, if at all, only by the most urgent considerations of self-preservation of the receiving State.

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[1] See Adair, op. cit., p. 170.

[2] Op. cit., § 123.

[3] Op. cit., vol. ii, p. 171. Cf. Bluntschli, op. cit., pp. 197–9.

[4] Op. cit., vol. i, p.20.

[5] De Garden, *Traité complet de la diplomatie*, vol. ii, p. 86.

[6] See *infra*, p. 337.

[7] Op. cit., p. 509.

[8] *Correspondence of Queen Victoria*, vol. i, p. 1907.

[9] He notes that sometimes the inviolability of diplomatic mail is assured by treaty, citing the Exchange of Notes between Great Britain and Mexico of 13–17 May 1922 and the Convention of Lima between Peru and Venezuela dated 14 March 1923.

[10] *An Outline of International Law* (trans. by Manning, 1930), pp. 64, 67.

Another, and in some respects a better, view is that expressed in the Comment on Article 14 of the Harvard Draft Convention,[1] namely, 'The receiving State shall freely permit and protect official communications by whatever means between missions and to and from missions.' According to the Comment, the Article is based on the principle, now generally recognized in practice—at least in time of peace—that universal freedom of diplomatic communications is a matter of interest to the whole community of nations. It is indeed fundamental to the maintenance of diplomatic intercourse. The weakness of these observations lies in the fact that they base the rule on a 'principle, now generally recognized in practice'. One would have thought that the basis of the privilege of freedom of communication would by now have attained the status of a rule of international law.[2] But the Comment does take account of the realities, and in particular the exception in time of war. The effect of war is to restrict the privilege of freedom of communication. This follows from the paramount right of a State at war to take all steps necessary to ensure the unhindered conduct of the war, including the restriction of individual and specific rights. The exercise of this paramount right by a receiving State in respect of communications to and from diplomatic envoys accredited to it is exemplified by the restrictions imposed in the United Kingdom during the Second World War. The unhindered passage of diplomatic correspondence appears to have continued unabated for as long as possible. But in April 1944, as part of the security precautions preceding the Allied invasion of Europe, it was provided that diplomatic envoys, in the same way as all other aliens, on being required to do so should declare whether they were carrying letters, written messages, &c., and, if required, produce them. Their person and baggage might be searched[1]—a suspension of the immunity of the courier with a diplomatic bag. The transmission and receipt by diplomatic missions of telegrams in code was also suspended.

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[1] See *supra*, p. 307, n. 1.

[2] The Comment also cites a number of Conventions in which immunities are granted to courier services and diplomatic pouches. Is it to be inferred from the fact that the privilege has been granted in treaties that it is not yet firmly based in a rule of international law?

On the other hand, postal packets sent in the official service of the chief diplomatic representative of a foreign Power were at about the same time exempted from the general prohibitions then imposed on sending packages abroad by post or otherwise,[2] thus saving the normal arrangements whereby the diplomatic bag officially sealed is transmitted through the ordinary post to and from diplomatic missions exempt from all interference.[3]

A similar right to control communications between diplomatic envoys of neutral Powers and their home States may also be possessed by an invading Power whose army is besieging the town in which the envoys are stationed. Thus during the siege of Paris by the Germans in 1870, Bismarck declared that he was prepared to allow foreign diplomats in Paris to send a courier to their home States once a week, but only if their dispatches were open and did not contain any remarks concerning the war. The United States and other Powers protested, but Bismarck did not alter his decision. The whole question 'must be treated as open'.[4]

V. *Conclusions*

It is well established that the decision whether a person is entitled to diplomatic status is for the Executive. The courts will consider themselves bound by that decision and will not undertake to examine it. The Executive in England has not claimed such powers with regard to rights and privileges flowing from diplomatic status. Yet these rights and privileges, especially if they extend beyond the minimum necessary to enable an envoy to fulfil his mission, may be abused to the prejudice of other, unprivileged, individuals. It is therefore important to establish which privileges are rightly and properly granted as being based on rules of international law and founded on the necessity of avoiding *coactio* with regard to diplomatic persons; such privileges cannot lightly be withdrawn, if indeed they can lawfully be withdrawn at all in time of peace. Other privileges can be shown to be based on nothing more than international courtesy, not amounting to binding custom, or administrative convenience. They may depend on reciprocity. They often have no other basis than the *mystique* which surrounds the ambassadorial office. Their continuance is in most cases essential for the maintenance of friendly international relations, but it is important that they be regarded not uncritically and seen for what they are.

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[1] Direction dated 17 April 1944 (S.R. & O. 1944, No. 482).

[2] Control of Communications Order (No. 1), 1944 (S.R. & O. 1944, No. 347, dated 25 March 1944). Revoked and replaced on 4 July 1944 by S.R. & O. 1944, No. 776. See Schwelb in *Modern Law Review*, 7 (1944), pp. 223–77.

[3] See Satow, op. cit., § 323.

[4] See Oppenheim, op. cit., vol. ii (7th ed. by Lauterpacht, 1952), § 157, n. 4, and authorities there cited.

The following rules would appear to emerge from a consideration of what has been written in the preceding pages:

1. The right of a diplomatic envoy to personal inviolability, as distinct from the right of freedom from arrest by the local authorities and trial by the local courts, was in the past a valuable and effective right. It is to be doubted whether the right still exists to any significant extent in normal conditions at the present day. In any event it is not, and probably never was, an absolute right; the infringement of it is not a crime of absolute liability. Nor is the infringement of the right, if it exists, a crime calling for special punishment of the offender. The machinery of State, the efficiency of modern police forces, and the settled conditions in most centres of government where envoys transact their business, have rendered such measures unnecessary. The ordinary provisions of municipal law suffice to ensure that the envoy is protected from violence and from injury to his person, his property and his reputation. A special right to personal inviolability is therefore no longer needed and—*cessante ratione legis, cessat ipsa lex*—should no longer be regarded as a rule of international law.

2. No rule of international law requires that a diplomatic person should be exempt from the payment of income tax on his personal income. It is not strictly necessary for the exercise of the diplomatic function. By custom and courtesy, exemptions are granted to heads of missions and certain members of their staffs in respect of their official emoluments and occasionally in respect of other income. But concessions based on the difficulty of collection of tax, or on the difficulty of enforcement by judicial process, must not be regarded as true exemptions.

3. Diplomatic persons are not normally exempt from having to pay purchase tax and similar imposts on articles bought by them. No such exemption is called for by any rule of international law.

4. The estate of a deceased diplomatic envoy cannot in the nature of things be entitled under international law to exemption from death duties, although such exemption may in practice be accorded. The only justification for the granting of diplomatic immunities is to enable the person to whom they are granted to fulfil the duties of his mission. With the death of such a person, his mission is at an end and immunities and exemptions are no longer called for.

5. Members of embassies and legations commonly enjoy exemption from customs duty on goods imported by or for them and their families, and exemption from customs examination of parcels and postal packets addressed to them is largely granted. Subject to the overriding immunity of the diplomatic bag in time of peace, however, international law does not require customs exemptions.

6. A consideration of all the types of taxation reviewed in this article, and of whether in each case diplomatic agents do or do not enjoy exemption, leads to the conclusion that there is no firm rule of international law that such persons ought to be exempt from paying taxes. No distinction can be made in this regard between direct and indirect taxation. In the case of income tax, where exemption exists it is based on comity or even on considerations of propriety. The fact that exemptions have had to be provided for in international treaties and that diplomatic persons who are nationals of the receiving State are commonly excluded from the privilege of immunity from income tax, strongly supports the conviction that those exemptions are not legally necessary. In the case of purchase tax, concessions are infrequent, and no good reason is seen why they should not be, except where articles are required for the purposes of a diplomatic mission and their price is by the tax made prohibitive. But, in practice, missions import most of their own requirements in the way of furniture, equipment, and the like; and customs exemption on such importation is commonly granted. No other customs concession is normally needed to avoid hindrance to the carrying out of the diplomatic function, and although concessions in favour of ambassadors and their retinue have a long history, they are still within the ambit of usage.

7. Diplomatic persons are not, according to international law, entitled as of right to freedom of movement, beyond that required to give them free access to the Foreign Office of the Government to which they are accredited. They are entitled freely to enter the country and to travel to the seat of government. Their right to leave the country may be suspended for good reason by the local authorities, certainly in time of war and probably also in time of peace. They are not entitled as of right to move freely about the country—there is no *jus spatiendi* for diplomatic persons in international law.

8. Diplomatic representatives have the right, and also the duty, to reside at or near the seat of the Government to which they are accredited and (probably) to follow that Government when it is forced by stress of circumstances to move its headquarters.

9. International law requires that couriers, dispatches, and other communications between an embassy and its home State shall be permitted to pass without inspection or interference. Only in grave emergency in time of war is a departure from this rule permissible.

FOREIGN ARMED FORCES: QUALIFIED JURISDICTIONAL IMMUNITY[1]

By G. P. BARTON, PH.D.

I. *Introductory*

VARIOUS aspects of the exercise of jurisdiction over visiting forces have already been discussed in two previous articles in this *Year Book.*[2] The present article is devoted to an inquiry into the question whether there is a half-way house between total immunity and full liability for members of visiting forces who commit crimes against the local law. In the first of the previous articles[3] the subject treated was the extent to which the service courts and authorities of a visiting force were entitled, as a matter of international law, to exercise their jurisdictional powers over members of the force under their command while on the territory of the local State.[4] Associated with that question was the twin problem of the precise relationship between the local law and the jurisdictional powers of the service courts and authorities of the visiting force. A question as to which there was acute difference of opinion[5] was the subject of the second article,[6] namely, whether there is any rule of international law conferring upon the service courts and tribunals of a visiting force the absolute and exclusive right to exercise criminal jurisdiction over members of that force who commit offences against the local law. Although it would be optimistic to assert that the protagonists of that supposed rule of international law have been altogether convinced by recent developments,[7] it is probably true to say that they are a dwindling minority.[1] Even if it be conceded that there is no principle of international law going to the extent of denying jurisdictional immunity altogether, it is still necessary to determine whether there might not be some principle recognizing immunity in certain circumstances. It is that problem which forms the subject-matter of the present article. It is a question which is still in a state of uncertainty and which is not entirely academic, notwithstanding the jurisdictional arrangements that have been concluded between the parties to the North Atlantic Treaty and to other regional defence pacts. It may still be argued on behalf of a member of a visiting force who has committed an offence against a fellow soldier or in the course of his duty and who has been committed for trial in a local court pursuant to the provisions of Article VII (3) (*c*) of the Status of Forces Agreement,[2] that he was not subject to the criminal jurisdiction of the local courts. It is therefore proposed to examine the various circumstances which have from time to time been suggested as characterizing offences which ought not to be justiciable in the local criminal courts, with a view to determining whether that suggestion has any basis in law.

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[1] The following abbreviations, in addition to those in common use, appear throughout this article:

A.J.—American Journal of International Law; A.L.R.—*The Argus* newspaper Law Reports, Melbourne, Australia; *Annual Digest—Annual Digest of Public International Law Cases*, 1919–1932, *Annual Digest and Reports of Public International Law Cases*, 1933 to date; *Boletim—Boletim da Sociedade Brasileira de Direito Internacional*; *Bulletin—Bulletin de Législation et de Jurisprudence Égyptiennes*; *Clunet—Journal du droit international fondé par E. Clunet*; *Col. L.R.—Columbia Law Review*; *Cong. Rec.—Congressional Record* (U.S.A.); D.L.R.—*Dominion Law Reports* (Canada); *F.R.—Foreign Relations of the United States of America* (Edited by the Department of State); *G.T.M.—Gazette des Tribunaux Mixtes* (Egypt); *J.T.M.—Journal des Tribunaux Mixtes* (Egypt); *Mod. L.R.—Modern Law Review*; P.C.—*Privy Council* (Canada); *Revista—Revista Militar Brasileira*; S.R. & O.—*Statutory Rules and Orders* (United Kingdom); *U.K.T.S.—United Kingdom Treaty Series.*

[2] This *Year Book*, 26 (1949), p. 380, and ibid. 27 (1950), p. 186.

[3] Ibid. 26 (1949), p. 380.

[4] See also the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty of 19 June 1951 (hereinafter referred to as 'Status of Forces Agreement'), Article VII (1) (*a*), for a typical provision in a multilateral jurisdictional agreement. And see *United States of America* v. *Weiman* (1953), 3 Ct. of Mil. App. 216, *A.J.* 48 (1954), p. 158.

[5] For a succinct statement of both sides of the controversy see Schwartz, 'International Law and the NATO Status of Forces Agreement', in *Col. L.R.* 53 (1953), pp. 1091, 1093, n. 12.

[6] This *Year Book*, 27 (1950), p. 186.

[7] Of which some of the more significant are the following: Agreement relative to the Status of

II. *Offences 'within the camp'*

The vast majority of writers who have dealt with the subject of jurisdiction over visiting forces have stated that crimes committeed by members of a visiting force within the confines of their camp are not cognizable by the local courts. Even writers who have been unwilling to concede absolute jurisdictional immunity have had no hesitation in stating that immunity is allowed wherever the offence is committed within the bounds of the quarters occupied by the visiting force. Representative of this attitude is the treatment of the subject in the seventh edition of *Oppenheim*:[3]

> 'A crime committed on foreign territory by a member of these [visiting] forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by the authorities of their home State. This is, however, only

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Members of the Armed Forces of the Brussels Treaty Powers, Cmd. 7868; Status of Forces Agreement, Cmd. 8279; Protocol on the Exercise of Criminal Jurisdiction over United Nations Forces in Japan, Cmd. 9071; Agreement regarding the Status of the United Nations Forces in Japan, Cmd. 9229; Visiting Forces (United States of America) Act, 1947 (Canada), 11 Geo. VI, c. 47; Visiting Forces (North Atlantic Treaty) Act, 1951 (Canada), 15 & 16 Geo. VI and 1 Eliz. II, c. 22; Visiting Forces Act, 1952 (U.K.), 15 & 16 Geo. VI and 1 Eliz. II, c. 67; and ratification of the Status of Forces Agreement by the United States Senate, for which see Schwartz, loc. cit., p. 1091.

[1] Mostly in the United States of America, where considerable pressure is being exerted to have a reservation attached to the Status of Forces Agreement in line with the amendment proposed by Senator Bricker in the debate in the United States Senate on the ratification of that Agreement: see 99 *Cong. Rec.* 4818 (7 May 1953); ibid., 9081 (14 July 1953). It ought also to be added that there are still some who are a little doubtful about the question (see *Sydney L.R.* 2 (1954), p. 225) and others who assert that there are no definite rules of international law governing the issue (see *Harvard L.R.* 65 (1952), p. 1072).

[2] Cmd. 8279, p. 5.

[3] *International Law* (1947), vol. i, § 445.

valid in case the crime is committed... within the place where the force is stationed...; it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress . . . and then and there commit a crime.'

This phraseology carries the reader back to the era prior to that of total war. The visiting force traverses the local territory by some well-defined route or remains within the territory stationed in some garrison or fortress,[1] from which members emerge as private individuals on some frolic of their own.[2] The outlook typified in the passage quoted above has had a far-reaching influence on the whole subject of jurisdiction over visiting forces. It must also bear some of the responsibility for the persistence of the fiction of exterritoriality.

Those two notions were linked together in the negotiations[3] between the Governments of the United Kingdom and the United States of America during the First World War. The chief aim of these negotiations, which were initiated by the British Government, was to amend the law of the United Kingdom so that the courts and authorities of the United States Army would be enabled to exercise all the jurisdictional power that had been vested in them by United States law. In the opening Note of 5 September 1917 from the British Government to the Ambassador of the United States of America in London, a distinction was drawn between soldiers in the United States Army who were found outside the quarters occupied by the American forces and those who were within those quarters. The assumption underlying this distinction was that the United States military authorities needed no legal assistance in order to enable them to exercise their jurisdictional powers within their quarters, but that without legal assistance they would be unable to exercise those powers outside the confines of their quarters. That jurisdictional disability would be removed once authority were conferred on them by the law of the United Kingdom to exercise their powers of arrest, detention, trial, and punishment within Great Britain. Whatever merit such a distinction may have, it is clear that there is nothing in the first Note, or in the successive Notes during the course of the negotiations, which was intended to apply to the immunity of the members of the United States forces from criminal prosecution in the local courts for offences whether or not they were committed within the limits of the camp.[4] That issue was never raised in the negotiations.

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[1] Schwartz, loc. cit., p. 1106.

[2] *Joel* v. *Morrison* (1834), 6 C. & P. 503, *per* Parke B.

[3] *F.R.*, 1918, Supplement 2, pp. 733 ff.: see also this *Year Book*, 26 (1949), pp. 391–5, and ibid. 27 (1950), pp. 192–3.

[4] It is noteworthy that the reply of the Government of the United States of America to the proposal of the United Kingdom Government that certain offences should be tried only in British courts emphasized the jurisdictional power of the service courts and tribunals of the United States Army to try offences committed in American camps: see *F.R.*, 1918, Supplement 2, pp. 748–9, though it must not be assumed that this opposition is to be interpreted as supporting the view that such offences could not be tried in the British courts.

Nevertheless, the exchanges of diplomatic correspondence which passed between the two Governments have been interpreted as giving support to the view that there is a principle of international law which attaches differing legal consequences to an offence committed by a member of a visiting force according as it is committed within or without the quarters of the camp.

A study of the provisions of the Havana Code of Private International Law[1] relating to the exercise of jurisdiction over visiting forces reveals that the authors of the Code were strongly influenced by the dichotomy of offences committed by visiting servicemen. There had been a number of previous attempts in Latin America to reach agreement on some provision, to be included in a Code applicable to all contracting States, in which the jurisdictional status of visiting forces would be regulated. One of the earliest such efforts appeared in a draft code presented to the Sixth Subcommittee of the Committee of Jurists of the Pan-American Union at Rio de Janeiro in 1912 by the Brazilian jurist, Pessôa. In the draft Article 96 of this Code,[2] it was provided that crimes committed within the precincts of the camp (*en el recinto del campamento*) of a foreign army which has entered the territory of the State with its consent are subject to the jurisdiction of the appropriate military authority. There was one exception, however, in the case where the offence within the camp had been committed by one local citizen against another. Outside the camp, on the other hand, the local jurisdiction was to remain unimpaired in respect of crimes committed by officers and men. This text, which was incorporated with the approval of the Sub-committee in its draft Code as Article 140,[2] rejects the extreme theory of exterritoriality, which would regard all offences committed within the area occupied by the visiting force, whether by civilians or by soldiers, as having been committed outside local territory. His rejection of this extreme position did not prevent Pessôa from recognizing a form of exterritoriality by his acknowledgement that offences committed within the camp by members of the visiting force must be regarded as outside the jurisdiction of the local courts and by his implicit acknowledgement that even offences committed by local inhabitants, other than offences committed by one inhabitant against another, fell within the jurisdiction of the service courts and authorities of the visiting force, if committed within the limits of the camp.

Although Pessôa's draft has been criticized for what has been described as its somewhat unrealistic approach,[3] it formed the basis of the final text which emerged from the deliberations at the Sixth Pan-American Conference at Havana in 1928.[1] Article 299 of the Bustamante Code, which was annexed to the Convention on Private International Law adopted on 20 February 1928, provided:[2]

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[1] Final Act of the Sixth International Conference of American States, 1928, p. 16.

[2] For reference to this Code see Bustamante, *Derecho Internacional Privado* (1943), vol. iii, p. 23.

[3] Carneiro, 'A extraterritorialidade da fôrça armada em território aliado', in *Revista*, 43 (1946), p. 134.

> 'Tampoco son aplicables las leyes penales de un Estado a los delitos cometidos en el perímetro de las operaciones militares, quando autorice el paso por su territorio de un ejercito de un otro Estado contratante, salvo que no tengan relación legal con dicho ejercito.'

In Pessôa's draft Code the area within which offences by members of the visiting force fell within the exclusive jurisdiction of the authorities of that force was defined as 'el recinto del campamento'. This narrow and comparatively easily ascertainable area was replaced in the Havana Code by the expression 'el perímetro de las operaciones militares'. The elastic interpretation of which such an expression is susceptible was illustrated by the decision of the Supreme Court of Brazil in *In re Gilbert*.[3] In that case a member of the United States forces was accused before a Brazilian Court[4] on a charge of having shot and killed a local inhabitant. The offence took place while the accused was on sentry duty immediately outside the gate of the camp, which was occupied exclusively by the forces to which he belonged. From a superficial reading of the judgment of Nonato J., who was the only member of the Court to deal with this aspect of the case, it might appear that the Havana Code was not applied. This would be true, because the Judge held that the Code was solely concerned with the case of a passage of foreign forces through local territory with the consent of the local sovereign.[5] Notwithstanding his rejection of the Code, the reasoning of Nonato J. was based to a certain extent on the principles contained in the

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[1] See above, p. 344, n. 1.

[2] 'Nor are the penal laws of a State applicable to offences committed within the area of military operations, when it authorizes the passage of an army of another contracting State through its territory, except offences not legally connected with that army.'

[3] *Diário da Justiça*, 21 August 1945, Jurisprudência, pp. 2969–72; *Annual Digest*, 1946, Case No. 37.

[4] The case came before the Supreme Court of Brazil as a result of what has been described, somewhat whimsically, as a negative conflict of jurisdictions. The civil Court before which Gilbert was first charged declined jurisdiction because of the military nature of the crime, and suggested that the case be remitted to a military court, which exercises in Brazil, as in many countries, a broad jurisdiction over military and civilian persons for so-called military offences. The military court also declined jurisdiction on the ground that neither the accused nor the victim was a military person according to Brazilian law. It may be noted that some of the cases falling within the category of decisions on the question of the exercise of jurisdiction over visiting forces are cases in which the conflict was not between the local civil courts on the one hand and the military courts of the visiting force on the other, but rather between the civil and military courts of the local State: see *Ministerio Fiscal* v. *Johnson*, decided by the Supreme Court of Cuba on 3 April 1918, Case No. 177, and referred to briefly in Bustamante, *Derecho Internacional Privado* (1943), vol. iii, pp. 24–5; *In re Polimeni*: *Foro Italiano*, 60 (1935), II, p. 381; *Annual Digest*, 1935–1937, Case No. 101; see also this *Year Book*, 27 (1950), p. 220.

[5] See Accioly, 'Conflito de Jurisdições em Matéria Penal Internacional', in *Boletim*, 1 (1945), p. 97.

Code. In his search for creative principles (*regras emergentes*) which would aid him in reaching a solution in conformity with the overriding concept of sovereignty, the learned Judge relied on the conclusion of Podestá Costa,[1] an eminent Argentinian jurist, who had found the key to the problem in the theory of interest. For Podestá Costa, any doubts about the exercise of jurisdiction would be settled by recourse to the test of which State was principally affected by the commission of the offence.[2] In his view this test showed that the military authorities of the visiting force were principally, if not solely, affected by the commission of a crime within the confines of the camp, and for that reason they and they alone should have jurisdiction over such offences. Reverting to the Havana Code, Nonato J. saw in the expression 'el perímetro de las operaciones' a principle which was congenial to the interest theory of Podestá Costa. If the military authorities alone were interested in trying their servicemen for offences committed within the camp, how much more would they be interested in offences committed in time of war within the whole zone of operations?

The Anglo-Egyptian Convention of 26 August 1936[3] provides another apparent support for the argument that members of visiting forces are not liable to be tried in the local courts for offences committed within the quarters occupied by them. Article 5 of that Convention provided:

> 'Without prejudice to the fact that British camps are Egyptian territory, the said camps shall be inviolable and shall be subject to the exclusive control and authority of the Appropriate British Authority.'

By the terms of this Article the British forces were accorded, subject to the provisions of the Treaty of Alliance[4] and the Military Convention, the status of forces in military occupation of the vast areas defined as their camps. So great was the similarity between the position of the British camps in Egypt and leased territory that in one case it was strenuously contended before the Mixed Court of Cassation that a person who was not a member of the British forces was subject to the exercise of the jurisdiction of the British authorities and not to that of the Egyptian courts, because the offence with which he had been charged had been committed within the limits of a British camp.[5] The assimilation of the camps of the other foreign forces stationed in Egypt during the Second World War to the camps of the British forces was a process that came naturally to the Mixed Courts in Egypt. Upon this analogy they delivered a number of judgments recognizing immunity from prosecution in the local courts for offences committed within the camp occupied by the visiting force. Indeed, no instance has been found in which immunity for such offences was denied by the Mixed Courts.

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[1] Podestá Costa, *Manual de Derecho Internacional Publico* (1947), p. 47.

[2] The final clause in Article 299 of the Bustamante Code ('salvo que no tengan relación legal con dicho ejercito') may be interpreted as supporting such a view.

[3] *U.K.T.S.*, No. 6 (1937), p. 23.

[4] Ibid., p. 1.

[5] *Papanicolaou* v. *Ministère Public*: *Bulletin*, 58 (1946), pp. 92–93.

In *Manuel* v. *Ministère Public*, a case that concerned an offence committed outside a camp, the Mixed Court of Cassation impliedly recognized immunity for offences committed within camps when it said:[1]

> 'There exists no generally recognized rule of international law which extends the principle of immunity from jurisdiction, in the case of a sojourn by foreign troops by consent, in respect of offences against ordinary law committed *outside* military establishments.'

In another case the Mixed Courts gave oblique recognition to the immunity of a member of a visiting force from prosecution for an offence committed within his camp. In *Svelozar* v. *Ministère Public*,[2] one of the charges brought against the accused, a Yugoslav soldier, was that he had forged a travel warrant and train ticket. The offence was alleged to have taken place within a camp occupied by members of the Yugoslav forces in Egypt. On the question whether the place of the crime had any effect on its competence to entertain the charge the *Cour d'Assises* said:[3]

> 'Aussi bien, était-il sans intérêt pour les débats de s'arrêter à la question de savoir si, au moment de la fabrication de la feuille de route incriminée, Svelozar s'était trouvé dans le cantonnement de l'armée yougoslave ou ailleurs, encore qu'il ne résultât point du dossier qu'il se fût effectivement trouvé dans le campement de l'armée yougoslave où le faux avait été perpétré.'

It might be legitimately inferred from what the Court said that if there had been definite proof that the offence had been committed within the camp, then the line suggested by the Mixed Court of Cassation in *Manuel* v. *Ministère Public*[4] would have been followed and immunity recognized.

It is possible that the analogy of offences committed by members of visiting naval forces on board their vessels played an important part in persuading the Mixed Courts to acknowledge a principle of jurisdictional immunity for offences committed by visiting soldiers within their camps. The influence of the Resolutions adopted by the Institute of International Law at Stockholm in 1928 relating to the status of warships and their crews in foreign ports in time of peace[5] is apparent in many of the judgments of the Mixed Courts.[6] Article 20 of those Resolutions provided:

> 'If [members of the crew ashore who commit breaches of the local law] regain their

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[1] *Annual Digest*, 1943–1945, Case No. 42; *J.T.M.*, 15–16 March 1943, No. 3126, p. 4. Italics added.

[2] *J.T.M.*, 24–25 August 1945, No. 3504, p. 3.

[3] Ibid., p. 3.

[4] See above, n. 1.

[5] These Resolutions affirmed the *Règlement sur le Régime des Navires de Mer et de leurs Equipages dans les Ports étrangers en Temps de Paix* adopted by the Institute in 1898.

[6] For a criticism of the application of the Resolutions by the Mixed Courts of Egypt see King, 'Further Developments concerning Jurisdiction over Friendly Foreign Forces', in *A.J.* 40 (1946), pp. 258–60, and cf. Brinton, 'The Egyptian Mixed Courts and Foreign Armed Forces', ibid., p. 737.

ship without having been arrested, the local authorities have no right to board the ship for the purpose of arresting them . . .'

This provision is merely a corollary of the well-settled rule that sailors who commit offences on board foreign warships, whether within territorial waters or not, are immune from prosecution in the local courts unless there has been a waiver of jurisdiction by the sovereign to whom the warship belongs.[1] The result of the extension of that rule is that the naval offender who is fortunate enough to regain his base need not fear prosecution in the local courts. The extension is unsatisfactory and when it was worked out in particular circumstances it gave rise to artificial solutions.[2]

During the Second World War, none of the jurisdictional agreements concluded between Allied Governments contained any reference to offences committed by members of visiting forces within their camp,[3] nor was there any special provision made for such offences in the laws enacted by the legislatures of the countries which had received friendly foreign forces. During the debates in the House of Commons on the Allied Forces Bill in 1940, the then Attorney-General, however, said[4] that although clause 2 of the Bill affirmed the plenary jurisdiction of the courts of the United Kingdom over all offences committed by members of allied forces, 'in practice it is not, of course, claimed where an offence is committed within the lines and the life or property of one of our subjects is not involved'. Thus restricted to a differentiation in practice, the statement is not evidence for the principle that as a matter of international law members of visiting forces who commit intra-castral offences are entitled to immunity from prosecution. Indeed, in *R.* v. *Navrátil*[5] the Court rejected that principle. In that case a member of the Czechoslovak force stationed in the United Kingdom during the Second World War was indicted in an English court on a charge of having attempted to commit suicide and of having committed manslaughter. The incident took place within the confines of the camp, which was occupied exclusively by Czechoslovak soldiers, and neither the life nor the property of any British subject was involved. Nevertheless, Cassels J. had no hesitation in dismissing the contention that these were relevant factors.[6] On the other hand, it may have been because of the Attorney-

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[1] See *Chung Chi Cheung* v. *The King*, [1939] A.C. 160; *Annual Digest*, 1938–1940, Case No. 87.

[2] See especially *Anne et Consorts* v. *Ministère Public*: *J.T.M.*, 26–27 July 1943, No. 3183, pp. 4–5; *Annual Digest*, 1943–1945, pp. 142–3: cf. the El Pato incident between Peru and the United States of America, reported in *El Comercio* newspaper, Lima, Peru, 2 September 1946, p. 2*e*, and ibid., 15 September 1946, p. 2*d*, where official statements on the incident may be found.

[3] Except where the visiting allied forces were invested with the powers of an army in peaceful occupation of the whole or part of the local territory: see this *Year Book*, 27 (1950), pp. 203–4.

[4] 364 H.C. Deb., 5 s., col. 1405.

[5] *Annual Digest*, 1919–1942 (Supplementary Volume), Case No. 85.

[6] Ibid., p. 165. This decision has been strongly criticized by Táborský, *The Czechoslovak Cause* (1944), pp. 126–8, as being inconsistent with the Anglo-Czechoslovak Agreement of 25 October 1940: see this *Year Book*, 27 (1950), pp. 197–8. The author declares that since the offence

General's statement that in *Reference re Exemption of United States Forces from Canadian Criminal Law*[1] Rand J. propounded his test of qualified immunity as follows:[2] 'members of the United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their own camps'. Rand J. was unwilling to concur in the view of Duff C.J. and Hudson J. that members of the visiting United States forces were not in any way immune from prosecution in the Canadian courts, and he was equally unwilling to identify himself with Kerwin and Taschereau JJ., who were of the opinion that members of those forces were completely immune from local criminal proceedings. He found an acceptable qualification to their immunity in the place where the crime was committed. But even there he introduced a further qualification and denied jurisdictional immunity where the offence, though committed within the camp, was directed against the person or property of a local citizen.[3]

It is difficult to discover the basis upon which the differentiation between offences committed within a defined area and those committed outside it has been made. Logical consistency would seem to require that the distinction should be explained either by an uncompromising adherence to the fiction of exterritoriality of such areas or in terms of a lease of that area. Even the fiction of exterritoriality[4] provides an unsatisfactory basis for the distinction, for it is inconsistent with that fiction that any person, military or civilian, alleged to have committed an offence within the area occupied by the visiting force should be tried by the local courts. Yet the stoutest protagonists of the theory of exterritoriality as applied to the jurisdictional immunities of visiting forces have not applied the principle behind the fiction

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was not one of the three reserved to the exercise of the exclusive jurisdiction of the British courts under the Agreement (viz., murder, manslaughter, and rape), the normal rules of international law—as he understood them—ought to have been decisive in defining the proper forum for the trial of the offence. Because the crime had been committed within the limits of the camp, and since no British subject was involved, he argued that the British courts were unable to try the offender. But the author appears to have overlooked the fact that one of the charges brought against the accused was manslaughter. Accordingly, under the Agreement, it was the British courts that possessed the exclusive right to assume jurisdiction over the offender. See also Lipstein in this *Year Book*, 22 (1945), p. 327.

[1] [1943] S.C.R. 483; [1943] 4 D.L.R. 11; *Annual Digest*, 1943–1945, Case No. 36.

[2] [1943] S.C.R. 483, 527.

[3] Cf. below, pp. 360 ff.

[4] In the sense ascribed to that term by writers in the nineteenth century, namely, the notional carving out of a slice of territory from the jurisdiction of the local State. The expression is now used sometimes as a convenient legal abbreviation for jurisdictional immunity, and, if properly understood, no objection can be taken to it. Occasionally, the traditional language of exterritoriality will be found in unexpected places. One such example is contained in the Defence (Burial, Inquests and Registrations of Deaths) Regulations, 1942 (S.R. & O., No. 1444 of 23 July 1942, s. 5), which, *pace* Edwards in *Mod. L.R.* 16 (1953), p. 61, was a precedent for s. 7 of the Visiting Forces Act, 1952 (15 & 16 Geo. VI and 1 Eliz. II, c. 67). Section 5 (3) of those Regulations provided that when it was intended to dispose of the body of a member of the forces of the United States of America elsewhere than in a burial ground reserved solely for the use of an authority of those forces, certain specified sections of the relevant statute should apply 'in like manner as it applies in a case where the body of a deceased person has been removed *into England* for disposal'.

to its logical extreme. Furthermore the fiction demands, as a logical corollary of the premise on which it is based, that each individual member of the visiting force should constitute a kind of 'walking island', bearing all the insignia of his State's sovereignty and thus exclusively subject to the jurisdiction of his own military tribunals.

More acceptable than the fiction of exterritoriality and perhaps more consonant with certain doctrines of municipal law,[1] though sharing their inherent limitations, is the explanation of the differentiation in terms of a lease.[2] According to that argument, it is an implied term of every permission by one State for another to send armed forces to its territory, that the area occupied by the visiting force should be inviolable[3] and should be reserved for the use and enjoyment of the visiting force only. Since one of the paramount rights to which the authorities of the visiting force are entitled is the right to exercise jurisdiction over members of their forces, it may readily be appreciated that the association of the right to exercise such jurisdiction with the right to full use and enjoyment has produced the theory that the authorities of the visiting force are entitled, in accordance with the implied terms of the grant to them of the occupied area, to exercise *exclusive* jurisdiction over offences committed therein by servicemen under their command. When the grant of an area to the authorities of a visiting force actually amounts to a lease or an occupation licence, there may be strong arguments in favour of the view that the writ of the local sovereign does not run within that area. Agreements relating to the peaceful military occupation of territory would seem to support such arguments. But where the grant of an area for the use of the visiting force falls short of such a disposition of territory, there would appear to be no justification for concluding that the juridical consequences of an intra-castral offence committed by a member of a visiting force differ from those of any other offence. The absence of this distinction, as a test for determining whether jurisdiction ought to be exercised, from all the jurisdictional agreements concluded during the Second World War,[4] and, of even greater significance, from the multilateral agreements concluded within the last ten years,[5] may, it seems, be accepted as cogent evidence not only that the differentiation has no place in international law, but also that it has no utility in practice.

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[1] Cf. the doctrine of the 'implied term' in the principles of law relating to frustration of contract: see Cheshire and Fifoot, *The Law of Contract* (1952), pp. 456–60.

[2] Cf. the Leased Bases Agreement of 27 March 1941 between the Government of the United Kingdom and the United States of America (*U.K.T.S.*, No. 2 (1941), Cmd. 6259), as modified by an Exchange of Notes of 19 July–1 August 1950 (*U.K.T.S.*, No. 65 (1950), Cmd. 8076); and the Agreement between the two above-mentioned Governments, dated 21 July 1950, for the establishment in the Bahama Islands of a Long-Range Proving Ground for guided missiles (*U.K.T.S.*, No. 74 (1950), Cmd. 8109).

[3] Cf. Article 5 of the Anglo-Egyptian Convention of 26 August 1936 (*U.K.T.S.*, No. 6 (1937), p. 23).

[4] See this *Year Book*, 27 (1950), pp. 197–205.

[5] See above, p. 341, n. 7.

III. *Offences committed while the accused was on duty*

A circumstance that has usually been linked with considerations of the place where an offence was committed has been the quality of the accused at the time when the offence was committed. It has been said that if the accused member of a visiting force was on duty at the time when he transgressed against the local criminal law, he was entitled to immunity from prosecution for the offence. Thus, Oppenheim states, in the passage already quoted,[1] that the principle of jurisdictional immunity applies only 'in some place where the accused was on duty'. The same principle is expressed by Lawrence,[2] who says that in the absence of special agreement visiting forces would be under the jurisdiction and control of their own commanders, as long as they 'remained within their own lines or were away on duty, but not otherwise'. It will be noted that Oppenheim and Lawrence both refer to offences committed either at a place where or at a time when the member of the visiting force was on duty. That view has been predominant in writings and judicial decisions on the subject. No account is taken of the more vital question whether the crime was committed in the course of duty. It is only recently[3] that emphasis has been placed on the course of duty rather than on the period during which the accused was on duty.

The most thorough-going elaboration of a suggested principle of jurisdictional immunity available only if the offence in question was committed by a visiting serviceman while he was on duty was attempted by the Mixed Courts of Egypt during the Second World War.[4] Apart from the opinions of writers on international law, which have already been mentioned,[5] the Courts again placed great reliance upon the Resolutions of the Institute of International Law at its Stockholm Conference in 1928.[6] It is probable also that the Court was, perhaps unconsciously, influenced by the jurisdictional position of the British forces in Egypt under the Anglo-Egyptian Convention of 26 August 1936.[7] Article 4 of that Convention[8] had drawn a distinction between the civil liability of members of the British forces in Egypt for acts arising out of their official duties and liability for what might be termed private acts. It was only in respect of the former class of acts that there was to be immunity. Although in *Ministère Public* v. *Spender*[1] the Mixed Court of Cassation rejected the contention that the distinction was applicable to criminal, as well as to civil, liability, it is apparent that it was moved to do so only in conformity with the general rules relating to the interpretation of treaties and not because of any inconsistency with what it considered to be the relevant principle of international law relating to the exercise of jurisdiction over visiting forces.

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[1] See above, p. 342, n. 3.

[2] *Principles of International Law* (1923), p. 246, s. 107.

[3] See below, pp. 358–60, 367 ff.

[4] For a general discussion see Pathy in *Clunet*, 67–72 (1940–5), pp. 390 ff., and de Wee in *Revue de droit pénal et de criminologie*, 30 (1949), pp. 290 ff.

[5] See above, nn. 1 and 3.

[6] Article 20, the relevant portion of which reads as follows:

> 'If the members of the crew ashore on official duty (*service commandé*), whether individually or collectively, commit crimes or offences ashore, the local authority . . . should hand them over to the captain if he should demand their surrender.'

[7] *U.K.T.S.*, No. 6 (1937), p. 23.

[8] 'No member of the British Forces shall be subject to the criminal jurisdiction of the Courts of Egypt, nor to the civil jurisdiction of those Courts in any matter arising out of his official duties.'

The first case in which the Mixed Court of Cassation was presented with the opportunity of considering the legal consequences of offences committed by members of Allied forces in Egypt while they were on duty was *Triandafilou* v. *Ministère Public*.[2] The accused, who was a member of the Greek naval forces in Egypt, was alleged to have assaulted a policeman while ashore. It appeared from the evidence that the accused had been detailed to go ashore in order to purchase provisions for the warship. He had instructions to return by midnight, but before that hour he became involved in a fracas in the course of which the alleged offence took place. The main theme of the argument on behalf of the accused was that, as a member of an Allied force in Egypt, he was absolutely immune from criminal proceedings in the local courts. Alternatively, it was contended that he was entitled to immunity from prosecution for an offence which he was alleged to have committed while he was on duty. This contention counsel for the *Ministère Public* was not disposed to dispute in the *Chambre du Conseil*, although he doubted whether Triandafilou could be described as being on duty at the time when the offence was committed.[3] In this view the *Chambre du Conseil* concurred,[4] saying that the accused had committed the offence when he was ashore and completely outside his duty. In his argument before the *Tribunal Correctionnel*, to which the case was remitted, counsel for the accused relied upon the certificate of the commanding officer that on the day on which the offence was committed Triandafilou had left his ship to perform his duties ashore.[5] This certificate, it was argued, should be accepted as conclusive in deciding the question whether the accused was on duty at the time of the offence. The full implications of that argument, namely, that simply by the device of a certificate all members of visiting forces could be declared to be on duty, escaped counsel for the *Ministère Public*, although he was to make a strenuous attack on the conclusive nature of such certificates in a later case.[1] The *Tribunal Correctionnel* held[2] that the fact of accused's having left his ship to perform some duty ashore had no effect whatsoever on the circumstances of the commission of the offence, which, the evidence had clearly shown, had been committed completely outside any period of duty. But on appeal the Court of Cassation reversed the judgments of the two lower Courts, basing itself largely upon the sufficiency of the commanding officer's certificate. On this question the Court said:[3]

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[1] *Ministère Public* v. *Spender*: *G.T.M.* 28 (1938), p. 289, § 307; *Annual Digest*, 1938–1940, Case No. 191; *Ministère Public* v. *Spender* (No. 2), *G.T.M.*, 30 (1939), p. 37, § 23.

[2] *Bulletin*, 54 (1942), p. 259; *Annual Digest*, 1919–1942 (Supplementary Volume), Case No. 86; *A.J.* 39 (1945), p. 345.

[3] *J.T.M.* 30–31 March 1942, No. 2977, p. 5.

[4] Ibid., p. 7.

[5] Ibid., 27–28 May 1942, No. 3002, p. 3.

> '. . . the only question which arises here is whether Triandafilou was or was not on a mission at the time the offence was committed. In the Court below it was held that he had come ashore on a mission (the purchase of provisions for the ship) with leave to return to his ship by midnight, but that he was no longer on such a mission when he emerged a few minutes before midnight from the bar of the Place Mohamed Aly in a drunken condition and stabbed a policeman on duty. . . . The only reason why the members of the crew of a warship enjoy any immunity ashore is that they are carrying out orders relative to the needs of the ship.'

The Court then went on to say that in determining whether a person was on duty at a particular time, the true test was to accept the certificate of the officer. Duty (*service commandé*) was to be interpreted not with regard to the actions of him who has received the order but rather with regard to him who gave the order and who was concerned with its execution.

The danger that prosecuting counsel appears to have overlooked in accepting in principle the theory of immunity in respect of offences committed at a time when the accused was on duty presented itself in *Ministère Public* v. *Tsoukharis*.[4] In that case the accused had been given orders to go from Alamein to Amrieh; in disobedience to these orders, however, he made his way to Alexandria, where he joined three other Greek soldiers. The four soldiers became involved in an affray in which a British corporal was killed. A charge of homicide brought against Tsoukharis was entertained by the *Juge d'instruction*, who refused to allow the plea that the accused was immune from prosecution.[5] The *Chambre du Conseil* allowed the plea on the ground that it was bound to accept the certificate of the commanding officer of the Greek Forces in Alexandria that at the time of the offence Tsoukharis was on duty.[6] An appeal against that decision having been brought to the Court of Cassation, counsel for the *Ministère Public* attacked the decision of the *Chambre du Conseil* on the ground that its decision amounted to an abdication of the Court's duty to control the extent of the jurisdictional immunities conceded to members of visiting forces in

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[1] *Ministère Public* v. *Tsoukharis*, see below, n. 4.

[2] *J.T.M.* 27–28 May 1942, No. 3002, p. 3.

[3] Ibid., 13–14 July 1942, No. 3022, p. 3; *Annual Digest*, 1919–1942 (Supplementary Volume), Case No. 86.

[4] *J.T.M.* 19–20 February 1943, No. 3116, pp. 2–5; *Bulletin*, 55 (1943), p. 89; *Annual Digest*, 1943–1945, Case No. 40.

[5] *J.T.M.*, 19–20 February 1943, No. 3116, p. 2.

[6] Ibid., pp. 2–3.

Egypt.[1] The commanding officer would have a completely different view of the extent of those immunities from that entertained by the courts. It was impossible, he argued, that the notion of duty (*service commandé*) could be extended to cover a situation where the serviceman had disobeyed his orders and was virtually in a state of desertion. The Court was unable to give a final decision on the facts because in its view there was insufficient evidence from which any conclusions could be drawn.[2] It was content merely to reaffirm the position that it had taken up in *Triandafilou* v. *Ministère Public*, although from certain statements which the Court made it may be deduced that it viewed with concern any attempt to give an unreasonably wide extension to the notion of *service commandé*. ' "Mission under orders" means', the Court said,[3] 'a mission dictated by military requirements . . . the person giving the order is interested in the report of the person sent, whereas the latter is interested in prolonging the duration of the mission. If therefore, there is no report to make, there is no order in question; and a soldier who abuses his mission to prolong his leave will cease to be covered by immunity from jurisdiction.'

The trend thus initiated by the Court of Cassation was continued in *Cambouras* v. *Ministère Public*.[4] The accused in that case was one of a group of Greek soldiers who had been detailed to stand guard at the Greek Ministry of War in Alexandria. Technically, all the members of the group were regarded as being on sentry duty for a period of twenty-four hours at a time; they were liable to be called upon at any moment during that period, but they were allowed to absent themselves twice during the day for meals, provided that they notified their superior officer where they would be, so that they could be recalled immediately in an emergency. Cambouras left his post at 11 a.m., without giving any notification of his destination, and went to an *estaminet*, where he remained drinking until 3 p.m. On his way back to the Ministry of War he was followed in his somewhat erratic course by a large crowd of children and men, who jeered at him. An altercation broke out and in the ensuing scuffle Cambouras stabbed a man in the crowd. When charged with the offence it was argued on his behalf that he was immune from prosecution in conformity with the decision of the Court of Cassation in *Triandafilou* v. *Ministère Public*.[5] If Cambouras was on duty for a period of twenty-four hours without interruption, how, counsel asked, could it be denied that he was on duty at the time when the offence was committed? The *Cour d'Assises*[6] preferred to follow strictly the generalization of the Court of Cassation in *Ministère Public* v. *Tsoukharis* that

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[1] *J.T.M.*, 19–20 February 1943, p. 3.

[2] Ibid., p. 5.

[3] *Annual Digest*, 1943–1945, Case No. 40.

[4] *J.T.M.* 26–27 January 1944, No. 3259, pp. 2–4.

[5] See above, p. 352, n. 2.

[6] *J.T.M.*, 26–27 January 1944, No. 3259, p. 3.

'nul militaire ne peut abuser de ce que l'on appelle le "service commandé" '.[1]

The control of the local courts over the determination of the question of '*service commandé*' was reasserted by the Court of Cassation in *Gongoulis* v. *Ministère Public*,[2] where the accused was charged with having committed an indecent assault on a young person under eight years of age. The defence to the charge was a plea to the jurisdiction of the court on the ground that at the time of the offence the accused was on duty, as was evidenced by the fact that he was obliged to render and, after the alleged offence, had in fact rendered an account of his mission to his military superiors. In dismissing the plea the Court said:[3]

> '. . . il est constant que l'existence du service commandé est un fait qui dépend de l'appréciation souveraine des juges du fond; et le fait du service commandé, quoique apprécié au regard des autorités qui le donnent, ne saurait pas soi seul être établi souverainement par la seule attestation de ces dernières, les circonstances particulières de chaque cas devant être prises en considération par les juges du fond pour l'exacte appréciation de ce fait.'

If the local courts were to decide in each case whether the accused was on duty at the time of the offence, instead of relying solely on the certificate of the commanding officer of the accused, what course would they pursue when the mission in which the accused was engaged was a secret one whose nature could not be disclosed? This problem faced the Court of Cassation in *Ministère Public* v. *Scordalos*.[4] In that case the accused was charged with murder. A certificate was produced on his behalf stating that, at the time of the offence, he was 'chargé de certaines missions délicates et secrètes'. On the strength of this certificate the *Chambre du Conseil* held[5] that the accused was on duty at the time of the offence and, in accordance with the precedents established by the line of decisions of the Court of Cassation, that the accused was immune from criminal proceedings instituted in the courts of Egypt. The acceptance of the declaration of the accused's superior officer as final was attacked by counsel for the *Ministère Public* before the Court of Cassation, who contended that it was in violation not only of the general principles of international law, but also of the previous decisions of the Court of Cassation. The kernel of his argument was that it was not 'la qualité de militaire qui comptait, mais la nature de sa mission et le caractère militaire de celle-ci qui faisaient du marin ou de soldat un représentant du corps militaire, même en dehors de son cantonnement'.

In upholding the decision of the Court below the Court of Cassation answered the contention of counsel for the *Ministère Public* by declaring that Scordalos belonged to a special category of the visiting force and was deemed always to be on duty. It even went so far as to state that in view of the special character of the department of intelligence, Scordalos was on duty, was perhaps even more effectively so, during the hours of apparent leisure and leave. In its view the Court below had not neglected the task of inquiring into the circumstances of the case, as counsel for the prosecution had contended; but any court faced with the delicate and secret nature of the functions performed by an accused person at the time of the alleged offence was entitled to take into account the general nature of the accused's activities as a member of the visiting forces. If, as here, they involved the acquisition of naval intelligence, the court was justified in assuming that the accused was always on mission and therefore immune from prosecution for offences committed during the period when he was attached to the Bureau of Naval Intelligence.

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[1] *J.T.M.*, 19–20 February 1943, No. 3116, p. 5.

[2] Ibid., 28–29 January 1944, No. 3260, p. 3.

[3] Ibid., pp. 3–4.

[4] Ibid., 19–20 May 1944, No. 3308, p. 2.

[5] Ibid., p. 2.

The decisions of the Mixed Courts of Egypt that have already been discussed all related to members of a visiting naval force who committed offences while ashore. In *Manuel* v. *Ministère Public*,[1] an attempt was made to extend to all servicemen the qualified jurisdictional immunity which the courts had recognized in the case of sailors ashore on duty. But the contention went further and amounted to an argument by another route in favour of absolute immunity from prosecution. It was strongly urged that, unlike a sailor, a soldier was to be deemed as always being on duty.[2] If this argument were to be accepted, the Court of Cassation pointed out, all the discussion about the principle of international law relating to visiting forces would have been pointless. That a soldier should be considered as always being on duty the Court was prepared to concede in one instance only: where he was a member of an army of military or belligerent occupation. But, in the case of a simple sojourn or passage of troops, with a precise definition of the military zone, the Court said that[3] 'le militaire qui sort de la sphère du commandement effectif de ses chefs ne saurait être considéré comme rattaché au corps auquel il appartient, malgré son éloignement momentané, qu'à la condition de se trouver en service commandé pour les besoins de ce corps . . .'.

In the task of attempting a criticism of the theory which would allow jurisdictional immunity from criminal proceedings in the local courts for servicemen who may have committed offences during the period when they were on duty, much assistance may be gained from an unexpected quarter. The enthusiasm and, basically, the momentum of their own logic has compelled the champions of absolute jurisdictional immunity to expose the weakness of the position taken up by the supporters of the theory of conditional immunity, especially where the condition relates to the question of the exercise of duties by the visiting serviceman. These critics have shown how vague and indefinite the exception is, and how difficult is the task of determining whether a member of a visiting force was at any time on duty. On the other hand, it must be conceded that much of the uncertainty inherent in this type of conditional immunity is removed when the certificate of the commanding officer of the accused serviceman is accepted as conclusive evidence[1] of his having been on duty at the relevant time. But complete acceptance, as the Egyptian Mixed Courts realized, led in practice to absolute immunity unless the courts were to retain some power to review the certificate.

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[1] *J.T.M.*, 15–16 March 1943, No. 3126, p. 4.
[2] Ibid., 5–6 March 1943, No. 3122, p. 2.
[3] Ibid., 15–16 March 1943, No. 3126, p. 4.

Another criticism of the theory of immunity for offences committed by visiting servicemen while on duty, at least as that theory was expounded by the Mixed Courts of Egypt, is its dependence upon the theory of immunity for intra-castral offences. The Egyptian Courts saw it as a corollary of the pretended immunity, which, of course, they assumed to be well-settled as a rule of international law, conceded to members of a visiting force who committed offences against the local criminal law within the confines of their camp. It was a projection into the dimensions of time of an immunity whose dimensions were demarcated by spatial limits. In *Triandafilou* v. *Ministère Public*, for instance, the Mixed Court of Cassation explained the jurisdictional immunity of the accused in these words:[2]

> 'The only reason why the members of the crew of a warship enjoy any immunity ashore is that they are carrying out orders relative to the needs of the ship. In effect it is a case of extending the immunity of the ship itself outside the ship for the purpose of meeting its needs. This is the basis of the principle which withdraws these members of the crew from the local jurisdiction when they are on a mission (*service commandé*).'

All the objections that may be levelled against the theory of conditional immunity for intra-castral offences apply with undiminished force in relation to this extension of that theory. If that part of the local territory which happens for the time being to be occupied as a camp by a visiting force is not to be deemed to be outside the local jurisdiction, much less may that claim be made of the territory on which stands the member of the visiting force who is on duty, for that is the *reductio ad absurdum* to which the doctrine of the Mixed Courts would lead.

But the chief argument against the theory of conditional immunity for offences committed while the accused was on duty is its artificiality. The criterion on which it is based, namely, the period of time during which the offender was on duty, has little or no relationship with the offence charged against him. All kinds of crimes may, as the recorded cases have shown, be committed by members of visiting forces while on duty, and few of them have the remotest connexion with the duty being performed. The principle upon which this theory has been built is a legitimate rule of international law: no person carrying out an act as the agent of a State should be held personally responsible before the courts of another State for the criminal or civil consequences of that act, unless the act itself should be a crime under international law. It was the admission of that principle by the Government of the United States of America in the McLeod incident that brought the controversy[1] over the criminal responsibility of McLeod in the Courts of New York to an end. Certainly, any offence committed by a member of a visiting force as an agent of his Government falls within this principle, and it may be on this ground that the decision in *Scordalos* v. *Ministère Public*[2] should be explained.

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[1] Cf. Visiting Forces Act, 1952, 15 & 16 Geo. VI and 1 Eliz. II, c. 67, s. 11 (4), where the certificate is deemed to be sufficient evidence unless the contrary is proved; and Status of Forces Agreement, Article VIII (8), which provides, in the case of civil claims, for arbitration should dispute arise about the question whether a visiting serviceman was on duty or not.

[2] *Annual Digest*, 1919–1942 (Supplementary Volume), Case No. 86.

If the theory of conditional immunity were formulated to cover only such offences, it would refer not to offences committed at a time when the accused was on duty, but to offences arising out of acts or omissions committed in the course of duty. But the theory of conditional immunity for offences connected with duty has, at least in the writings of jurists and in the judgments of the Mixed Courts of Egypt, not been so restricted. It is of such general application that it would confer immunity from prosecution on all members of a visiting force who happen to be on duty at the relevant time for all offences, of whatever nature, that they might have committed during that period. The absurdity of the theory, as thus formulated, is well illustrated in the case of *Gongoulis* v. *Ministère Public*,[3] where it was raised by a member of a visiting force charged with indecent assault committed on a minor and where the Court was able to decline immunity only because of its refusal to accept the attitude of the commanding officer as conclusive.

IV. *Offences committed in the course of duty*

In traditional expositions of the rule of international law relating to the exercise of jurisdiction over members of visiting forces, the chief types of immunity which were said to be generally recognized were the two that have already been treated. Some of the discussions of the second type have strayed over the boundary of offences committed while the accused was on duty into the field of offences committed by the member of the visiting force in the course of his duty. Once an offence is thus characterized it is immediately removed from the sphere of the exercise of jurisdiction over visiting forces and is remitted to the principles of State responsibility. The McLeod incident, to which reference has already been made,[1] is an instance in point, and may be applied to the present discussion on an *a fortiori* extension. The incident is so well known, and has given rise to such exhaustive discussion, that it is unnecessary to repeat the details of it. It will be remembered that McLeod was a member of a British armed force sent into the territory of the United States of America by the Canadian authorities for the purpose of capturing the *Caroline*, a vessel equipped for crossing into Canadian territory and giving aid there to Canadian insurgents. When McLeod was arrested in New York some years later, the only ground on which the British Government was able to press its claim for his release was that his act was a transaction of the British Government, for which he could not be personally responsible. It was on this ground, and on no other, that Secretary Webster admitted McLeod's jurisdictional immunity. If a member of an armed force which comes on to local territory without the consent of the local sovereign is immune from the exercise of the jurisdiction of the local courts for acts done in the performance of his duty, all the more ought immunity to be granted to a member of a visiting force for a similar act.

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[1] For a full discussion of this controversy see Jennings, 'The *Caroline* and McLeod Cases', in *A.J.* 32 (1938), pp. 82 ff.

[2] See above, p. 355, n. 4.

[3] See above, p. 355, n. 2.

The application of this principle would have been a sufficient explanation for the decision of the Supreme Court of Brazil in *In re Gilbert*.[2] In that case, it will be remembered, the accused was charged before a Brazilian civil court with having shot and killed a local citizen who had insisted on entering the military camp to obtain payment of a debt owed to him by one of the soldiers in the camp. That the accused was a sentry on duty at the gate of the camp at the time when the deceased attempted to force an entry was regarded by the Court as being sufficient in itself to invest the offence with a purely military character and to remove it from the cognizance of the civil courts. Equally, it could have been deemed to be sufficient to place the offence within the category of acts done in the performance of official duty and thus exempt from the jurisdiction of the local courts, civil or military, on the principle recognized in the McLeod incident. One of the surprising features of the case was that the Court disregarded this principle, which would have disposed of the case with little debate, and reached its decision conceding immunity by tortuous reasoning based on analogies with the provisions of the Havana Code of Private International Law and on rules relating to the conflict of jurisdictions between the civil and military courts. These latter two grounds gave rise to ample criticism;[3] the suggested line of reasoning would have given rise to none. The only objection to granting immunity from prosecution for acts or omissions arising in the course of duty is one of classification.[1] It would be logically more satisfying not to include this type of jurisdictional immunity in the general field of jurisdiction over visiting forces.

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[1] See above, p. 358, n. 1.

[2] *Diário da Justiça*, 21 August 1945 (Jurisprudência — conflito de jurisdição, n. 1.520), p. 2969; *Annual Digest*, 1946, Case No. 37; see above, p. 345, n. 3.

[3] See Accioly, 'Conflito de Jurisdições em Matéria Penal Internacional', in *Boletim*, 1 (1945), p. 97.

V. *Offences committed against certain persons or property*

In general discussions on the relationship of visiting servicemen to the criminal jurisdiction of the local courts it has been rare to find any reference to the objects of offences committed by members of visiting forces. Considerations of this sort have been treated as relevant to the interest theory, according to which immunity from prosecution in the local courts was to be accorded to visiting servicemen who committed offences in which the local State could have no conceivable 'interest'.[2] Sometimes the interest theory was resorted to in order to supply a rational basis for the grant of immunity for intra-castral offences:[3] in such a case it was said the offence had no effect on the local State and it ought to be considered, to all intents and purposes, as having been committed in a foreign country. Similar arguments provided a rationalization for the theory of immunity for offences committed while the accused was on duty. Conversely, it has been argued that immunity should be denied where the local State has an interest in the offence, or, if a positive interest is wanting, where the offence affects no interest of the State to which the visiting force belongs. The chief criteria for determining whether one or other of the States concerned has an interest relate to the object of the offence. If a local citizen, or local property, is affected by an offence, then the local State, it is said, has an interest in the trial of the offence. If the offence concerns either a fellow serviceman or the property of the visiting force only, then, according to the interest theory, the local State having no real interest in the offence, the accused visiting serviceman ought to be immune from prosecution in the local courts. Although there are other circumstances in which it might be contended that one or other State had an interest in an offence, the two instances already specified are the examples which have from time to time been picked out for mention. Whatever utility the interest theory might have as a rule of thumb for deciding in a given case whether the local criminal court or the tribunal of the visiting force is the more appropriate tribunal for assuming jurisdiction, it is difficult to regard it as an accepted rule of law. Its want of consistent sponsors and its lack of authoritative antecedents raise doubts about its legitimacy.

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[1] Similar confusion in relation to civil liability of members of visiting forces to the jurisdiction of the local courts occurs, as appears from *Erasmus* v. *Smuts* (1942), 2 Northern Rhodesia Law Reports 250; *Hénon* v. *Gouvernement Égyptien et Amirauté Britannique*, *Bulletin*, 59 (1947), p. 225, *Annual Digest*, 1947, Case No. 28; and *Gouvernement Hellénique* v. *Abouteboul*, *J.T.M.*, 17–18 March 1948, No. 3898, p. 3, *Revue Hellénique de droit international*, 1 (1948), p. 279.

[2] See Podestá Costa, *Manual de Derecho Internacional Público* (1947), p. 47, whose application of the interest theory covered intra-castral offences as well. Such offences, in his view, 'afectan a la disciplina y no trascienden a la población': offences committed outside the camp, on the other hand, are under the jurisdiction of the local courts, 'pues afectan principalmente a éste tanto por su naturaleza como por el lugar en que se ejecutan'.

[3] Cf. *In re Gilbert*, *Diário da Justiça*, 21 August 1945 (Jurisprudência—conflito de jurisdição, n. 1.520), p. 2969; *Annual Digest*, 1946, Case No. 37; and Accioly, 'Conflito de Jurisdições em Matéria Penal Internacional', in *Boletim*, 1 (1945), p. 97.

Only in two reported decisions has the theory been referred to as a suggested rule of international law, and in a third its existence has been categorically denied. The first of these three cases in point of time contains the denial to which reference has been made; it was *R.* v. *Navrátil.*[1] The facts of the case, which have already been discussed,[2] reveal that the only persons affected by the offence were fellow soldiers of the accused. An argument[3] was submitted to the Court that it 'ought to take into consideration the fact that only Czechoslovak soldiers and citizens [were] concerned in that matter, which, in fact, arose within the lines of the camp'. In dealing with this point Cassels J. said:[4]

> '. . . if that were so, it would mean that, wherever there were foreign armed forces stationed in this country, there could be committed within the lines of their camp every conceivable offence against our law, which our courts would be quite unable to entertain at all. That is not so.'

On the other hand, in *Reference re Exemption of United States Forces from Canadian Criminal Law*,[5] one of the Judges of the Supreme Court of Canada, Rand J., expressly based his judgment on the interest theory.[6] Sir Lyman Duff C.J. and Hudson J. had decided[7] against the theory of absolute immunity advanced by the Government of the United States of America in the memorandum[8] presented to the Court, while Kerwin and Taschereau JJ.[9] had taken a diametrically opposite view and had recognized the plenary exemption from prosecution of members of visiting forces. It was left to Rand J. to take a middle course between these two extremes. The yard-stick employed by that learned Judge was the interest theory. The immunity which he was prepared to recognize in relation to intra-castral offences was subject to an exception where those offences affected citizens of the local State or property belonging to them. Conversely, where members of visiting forces committed offences outside their camps they were to be subject to prosecution in the local courts unless the offence affected the person or property of a fellow serviceman. Expressions of a similar kind were made by Dixon J. in the High Court of Australia in *Chow Hung Ching* v. *The King*.[1] Speaking *obiter*, the learned Judge said:[2]

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[1] *Annual Digest*, 1919–1942 (Supplementary Volume), Case No. 85.

[2] See above, p. 348, n. 5.

[3] *Annual Digest*, 1919–1942 (Supplementary Volume), Case No. 85. This argument no doubt derived its inspiration from the statement of the then Attorney-General in the House of Commons during the debate on the Allied Forces Bill, 1940, that 'in practice [plenary jurisdiction] is not, of course, claimed where an offence is committed within the lines and the life or property of one of our subjects is not involved': see above, p. 348, n. 4.

[4] *Annual Digest*, 1919–1942 (Supplementary Volume), Case No. 85.

[5] [1943] S.C.R. 483; *Annual Digest*, 1943–1945, Case No. 36.

[6] Ibid., pp. 131–3.

[7] Ibid., pp. 126–8.

[8] This memorandum was submitted to the Canadian Government at its informal request by the Government of the United States of America under cover of a Note dated 27 May 1943 in which the memorandum was said to set forth 'the views of the United States Government on the right under international law of members of the armed forces of the United States on Canadian territory with the consent of the Canadian Government to immunity from the local jurisdiction in criminal matters': see this *Year Book*, 27 (1950), p. 224, n. 5.

[9] *Annual Digest*, 1943–1945, Case No. 36, pp. 128–31.

> 'I am inclined to the view that a complete immunity from arrest and imprisonment for offences committed *against civilians* by a member of the visiting forces while off duty and mixing with the ordinary inhabitants of the country is not to be implied from a bare permission to enter for their own purposes given by the Crown to the forces of a friendly foreign power in time of peace.'

The application of the interest theory to the problem of the exercise of jurisdiction over visiting forces is an inversion of the protective principle and, perhaps to an even wider extent, of the passive personality principle of criminal jurisdiction in international law.[3] According to the first of those principles, a State is recognized in international law as being clothed with jurisdiction over an individual whose offence constitutes an injury to some national interest. Under the second, jurisdiction is similarly recognized for the courts of the State whose national is affected in person or property by the commission of the offence. Whatever standing these purported principles of jurisdiction may have in international law, they clearly apply to the existence of jurisdiction and not to immunity from the exercise of a jurisdiction already conceded to be existing. Within the context of the question of jurisdiction over visiting forces there is no doubt about the existence of concurrent jurisdictions. It has never been suggested that the authorities of the visiting force, on the one hand, or the local courts, on the other, have to justify their jurisdiction in relation to an offence by proving that the victim of it was either another visiting serviceman or else a local citizen. The resort to such tests to justify jurisdictional immunity is without precedent. The proper approach to the interest theory, it seems, is to view it as providing a guide for determining which cases should and which should not be tried by the courts martial of the visiting force where there is no jurisdictional agreement between the Governments concerned.

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[1] (1948), 77 C.L.R. 449; [1949] A.L.R. 29.

[2] At p. 484 and p. 50, respectively. Italics added.

[3] For a succinct discussion of these theories or principles of jurisdiction see Briggs, *The Law of Nations* (1953), pp. 575 ff.

Where such an agreement is contemplated, the interest theory presents a formula for determining the instances in which there ought to be the possibility of relaxing the jurisdictional immunity which it is proposed to grant. That the theory may serve such a function is illustrated in the Note[1] dated 5 May 1942 addressed to the Foreign Minister of the Netherlands Government-in-Exile in the United Kingdom by the British Foreign Secretary. Under the Jurisdictional Agreement[2] of the same date, the United Kingdom Government had agreed to recognize the exclusive jurisdiction of the naval courts martial established under Netherlands law in respect of offences committed by members of the Netherlands naval forces. That recognition was subject to the understanding that where the Netherlands naval authorities had on request seen fit to surrender a person subject to naval law, the local British courts might exercise jurisdiction over the offender. The Note set out the probable occasions for such a request in the following terms:

> 'His Majesty's Government might think it proper to request such a voluntary surrender for trial by the civil courts in a special case where a member of the crew of a Netherlands warship was accused of having committed a criminal offence against a member of the civil population who happened to be on board the ship when it was in a port of this country. For example, such a case might arise where the ship goes into port or dock for repairs and persons who are not members of the crew are employed on the ship for the purpose of carrying out the repairs.'

It will be necessary to revert to a consideration of the interest theory in the course of a discussion on the provisions of the Status of Forces Agreement: in the meantime it may be asserted that there is no evidence to support the view that the theory finds any place as a matter of legal principle in the sphere of jurisdiction over visiting forces.

VI. *The Status of Forces Agreement*

In a previous article[3] restricted to the general question whether there was a rule of international law recognizing the absolute immunity from prosecution in local courts of members of visiting forces, reference was made[4] to what was then the most recent multilateral agreement in point. Of that agreement, the Agreement relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers,[5] it was said that its provisions, and especially those contained in Article 7, furnished a conclusive answer to those who assert that agreements securing absolute jurisdictional immunity constitute the norm of international law.[6] If the jurisdictional agreement concluded by the Brussels Treaty Powers was of significance, it was outstripped in importance by a similar agreement between the member States of the North Atlantic Treaty Organization.[1] The arrangement between the Brussels Treaty Powers represented a consolidation of the view that immunity from criminal proceedings does not belong as of right to members of visiting forces. Although the rules enunciated in the Agreement between those Powers were subscribed to by States which have long enjoyed a hegemony in the development of international law in the community of nations, it was clear that the real test would arise when the United States of America was drawn into the multilateral defence arrangements which it had long been advocating for the States in the North Atlantic community.[2]

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[1] *Militair-Rechterlijk Tijdschrift*, 39 (1946), p. 104.

[2] See this *Year Book*, 27 (1950), p. 197, n. 3.

[3] Ibid., p. 186.

[4] Ibid., pp. 205–7.

[5] Cmd. 7868.

[6] This *Year Book*, 27 (1950), p. 232.

It had not been difficult to detect in the attitude of the United States of America towards the subject of the exercise of jurisdiction over visiting forces a dualism of approach, which justified it in denying at home a right that it claimed for itself abroad.[3] Until the conclusion of the Status of Forces Agreement, the evidence of the practice of the United States of America was apparently equivocal. As has been pointed out elsewhere,[4] the enactment by the Canadian Parliament, without any revealed objection on the part of the United States Government, of the Visiting Forces (United States of America) Act[5] in 1947 represented a formidable argument in favour of the view that the United States no longer clung with the same apparent tenacity to those opinions on the exercise of jurisdiction over its forces abroad that had distinguished its diplomacy during the Second World War. The product of negotiations between the Government of the United States of America and other Governments, some of which had been thought to hold similar extreme views,[6] would therefore be of exceptional importance. It would either mark the crystallization of a divergence or represent the abandonment of a deviation in favour of the orthodox principle. In the Status of Forces Agreement orthodoxy prevailed.

Article VII of the Agreement[7] opens with a statement of the relevant rules which govern the exercise of jurisdiction over visiting forces for criminal offences and which it has been the purpose of previous articles[1] to show conform to the general principles of international law. The existence of concurrent rights to exercise jurisdiction over members of visiting forces who commit offences against local law would inevitably call for a working compromise, if there were a likelihood that the visiting forces would remain for any length of time within the territory of the local State. However acceptable the settlement[2] in favour of complete immunity from prosecution except for waiver[3] might have been in war-time as a form of compromise, it was not likely that the retention of a new type of capitulatory régime[4] would meet with approval in time of peace and within the framework of an organic community of partners in defence. A second possibility might have been that the State which happened to have custody of the offender should try him, whereupon his immunity from subsequent criminal proceedings would be dependent upon the operation of the rule against double jeopardy[5] rather than upon any principle of international law. This compromise, which would have vindicated the opinions of von Bar,[6] would have been as arbitrary in practice as it would have been simple to apply in theory. The third possible compromise would have been to enumerate various offences which should be tried in the local courts and others which should be tried before the service courts.[7] This, too, would have had the advantage of simplicity, but it would have provided little flexibility for dealing with circumstances where it would be inadvisable to adhere rigidly to a formula. The provisions of paragraph 3 of Article VII represent a practicable and sensible compromise which is to be preferred to any of those which have been suggested.

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[1] Cmd. 8279.

[2] Principally because the only evidence available of the attitude of the Government of the United States of America had indicated that its view was in favour of absolute immunity: see above, p. 361, n. 8.

It could not then have been expected that the attitude of that Government would undergo the thoroughgoing change which is evidenced in the hearings on the ratification by the United States Senate of the Status of Forces Agreement: see Schwartz, 'International Law and the NATO Status of Forces Agreement', in *Col. L.R.* 53 (1953), p. 1091, n. 1, and Executive Report No. 1 of the Committee on Foreign Relations to the Senate dated 28 April 1953, especially pp. 11–13.

[3] Although this is a characteristic from which no State is free, it does not necessarily follow that because a State appears to adopt different courses in relation to the one subject-matter it is guilty of inconsistency: but see Stone, *Legal Control of International Conflict* (1954), p. 31, n. 27, who seems either to have misunderstood or to have misinterpreted the position.

[4] This *Year Book*, 27 (1950), pp. 213, 232.

[5] 11 Geo. VI, c. 47 (Can.).

[6] This *Year Book*, 27 (1950), p. 205 (*d*).

[7] Cmd. 8279, p. 4.

The system adopted by that paragraph is new to international agreements on jurisdiction over visiting forces. The military authorities of the visiting force are declared to have the primary right to exercise jurisdiction over a member of their force in two cases, without in any way abrogating the right of the local courts to exercise jurisdiction. In all other cases the primary right is vested in the local courts.[8] It is further provided[9] that the

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[1] This *Year Book*, 26 (1949), p. 380, and ibid. 27 (1950), p. 186.

[2] As in the Agreement between the Governments of the United Kingdom and the United States of America dated 27 July 1942, to which effect was given under British municipal law by the United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. VI, c. 31.

[3] United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. VI, c. 31, s. 1 (1), proviso.

[4] Coutts, 'The New Capitulations', in *Northern Ireland L.Q.*, 5 (1942), p. 70.

[5] *Aughet* v. *The King* (1918), 13 Cr. App. Rep. 101, 34 T.L.R. 302; cf. *Yammas* v. *Ministère Public*, *J.T.M.*, 11–12 December 1942, No. 3087, p. 2, which must be explained as a decision on a particular provision of Egyptian municipal law.

[6] *Lehrbuch des internationalen Privat- und Strafrechts* (1892), p. 391: '. . . es wird daher in Ermangelung eines besonderen Vertrags die Prävention entscheiden.'

[7] Cf. *F.R.*, 1918, Supplement 2, pp. 744–5; Anglo-Czechoslovak Agreement of 25 October 1940, Article 2—this *Year Book*, 27 (1950), pp. 198–9; Foreign Forces Order, 1941 (Can.), P.C. 2546 of 15 April 1941, s. 3.

[8] Article VII (3) (*b*).

[9] Article VII (3) (*c*).

State whose authorities do not have the primary right to exercise jurisdiction may request the other State to waive its primary right. At this stage it is here proposed to consider separately the two instances in which the primary right of trying a visiting serviceman is entrusted to the authorities of the force to which he belongs.

(*a*) *Offences committed against certain persons or property*

Paragraph 3 of Article VII provides:

> 'In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> (*a*) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
>
> (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or a civilian component of that State or of a dependent; . . .'

In one earlier bilateral agreement there had appeared a provision which had the effect of conferring exclusive jurisdiction on the military authorities of the visiting force over servicemen who had committed offences against fellow-soldiers. The Anglo-French Agreement of 19 April 1948[1] stated the arrangement whereby the concurrent jurisdiction of the British military authorities and the French courts was to be subject to the exception, *inter alia*, that where the victim of the offence was a member of the United Kingdom armed forces then the United Kingdom military authorities were to have the exclusive right to exercise jurisdiction.

The aim of the signatory States to the Status of Forces Agreement, however, in settling upon primary jurisdiction in the circumstances enumerated in Article VII (3) (*a*) (i), appears to have been the designation of the instances in which the military authorities would have a prior interest in the trial of the offender. It may be legitimate to question whether this tendency to place emphasis upon the interest of the sending State is consonant with the principle of the impartial administration of justice. Underlying the contention that the primary right to jurisdiction over visiting servicemen ought to be vested in the military authorities of the visiting force is the implication that jurisdictionally the quality of the interest affected by the offence is a relevant factor. With certain offences it may be, but only where the offence is so defined. In the absence of such a definition it cannot be of any significance, as a matter of law, to the service courts of the visiting force that the victim was another member of that force. What conceivable particular legal interest, it may be asked, has the service court in the trial of a serviceman where he is accused of having stabbed another serviceman during a drunken brawl in a local tavern? The emphasis upon the interest affected by the offence as determining which of two jurisdictions should take cognizance of the offence is, it is believed, misconceived. The proper approach to the question can only be obtained by viewing the offence as a whole, and by an appreciation of the court's function in the trial of the offender.

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[1] *U.K.T.S.*, No. 44 (1948), Article 4 (1) (*a*).

It is easy to overlook the fact that although the accused may be in the dock, the real person on trial is a witness or the real investigation is into the legal relevance of some fact or into the logical cogency of a set of facts. The legal presumption of innocence, which is a feature, to a greater or less extent, of nearly all Western systems of criminal jurisprudence, places the onus upon the prosecution and this in turn makes it possible for a criminal trial to pass through all its stages without the active intervention of the accused. From a functional point of view the quality of the object of an offender's criminal purpose is irrelevant. What is important is the substance of the offence and which of two equally competent tribunals is better fitted[1] to try the issues pertaining to innocence or guilt. Such an approach necessarily lacks the somewhat attractive simplicity of the formula laid down in Article VII (3) (*a*) (i) of the Status of Forces Agreement; but it would compensate for that apparent deficiency by furnishing a test for determining which tribunal ought to have the primary right to jurisdiction that is more in accord with the realities of the case and more apt to work substantial justice than the inflexible operation of the interest theory.

(*b*) *Offences arising out of official duty*

In the Status of Forces Agreement the primary right to jurisdiction is also assigned to the authorities of the visiting force where the offence with which the accused is charged arises out of an act or omission done in the performance of official duty. It is difficult to determine the proper construction to be placed upon this provision. If the offence arises out of an act or omission done in the performance of official duty there ought to be no question of the right of the local State to exercise jurisdiction in the absence of a waiver on the part of the State to which the visiting force belongs. That waiver, it is clear, may be express or inferred from the absence of any objection on the part of the State in whose courts exclusive jurisdiction would normally reside. It is evident, however, that the terminology of primary jurisdiction is inappropriate in this situation. If the principles declared in the McLeod controversy[1] and recognized without dissent during the last century are to be accepted, then the local State may not exercise jurisdiction over such an offence without a waiver by the sending State. That may be the effect of paragraph 3 (*c*) of Article VII, which provides that if the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. On the other hand, it may be possible to contend that the expression 'offences arising out of any act or omission done in the performance of official duty' falls short of describing the circumstances in which the principles declared in the McLeod controversy would come into operation. By virtue of the provisions of s. 11 (4) of the Visiting Forces Act, 1952,[2] which deals with the evidentiary aspect of the expression, its precise extent is largely an academic question within the United Kingdom. That sub-section enacts that a certificate issued by or on behalf of the appropriate authority of the sending country, stating that the alleged offence, if committed by a visiting serviceman, arose out of and in the course of his duty as a member of that force, shall in any proceedings in a United Kingdom court 'be sufficient evidence of that fact unless the contrary is proved'.[3] It would be possible, however, for a substantial dispute to arise as to whether an offence fell within the wording of section 3 (*a*) (ii) of Article VII.[4] In such a case the court would be driven to decide the question for itself, without the assistance of any specific direction on the part of the authorities of the visiting force. Its inquiry would probably follow the traditional lines laid down in innumerable cases in the field of private law relating to the liability of a master for the acts of his servants.

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[1] For a striking example of the difficulties which confront one tribunal and not another see *United States of America* v. *Hicks*, reviewed in *Hicks* v. *Hiatt* (1946), 64 F. Supp. 238; and cf. *Lawson* v. *Lawson*, [1955] 1 W.L.R. 200, 203, C.A., *per* Lord Goddard C.J., as to the composition of certain tribunals and their fitness for dealing with certain types of case.

Thus far there appears to have been only one reported decision on the operation of Article VII (3) (*a*) (ii), and that was a judgment of the *Cour d'Appel* of Paris in *Affaire Gadois*.[5] It is not possible to extract from the case any general principle relating to the exercise of jurisdiction over visiting forces, as the Court was concerned with two narrow issues. In that case Gadois, a Frenchman, had been killed by an American Army lorry driven by a United States soldier named Zerfoss. A judicial inquiry was made into the accident and it closed with the finding that Zerfoss was not to blame for the death of Gadois. An appeal having been brought against that decision on behalf of the infant son of Gadois, a grand jury found on 27 March 1953 that there were certain presumptions against Zerfoss's innocence and that there should be a supplementary inquiry before the examining Magistrate at Melun. The Status of Forces Agreement came into force, as regards France, on 22 April 1953. The authorities of the United States Army in France informed the examining Magistrate that Zerfoss had been repatriated to the United States of America. Furthermore, by letter dated 23 October 1953 they informed the Court that at the time of the accident Zerfoss was performing official duty and that they intended to avail themselves of the jurisdictional priority conferred upon them by Article VII (3) (*a*) (ii) of the Agreement. Of the two arguments submitted by the plaintiff, the first is not of much importance in relation to the extent of the relevant provisions of the Article, since it deals with the retrospective effect of the Agreement[1] and with the juridical quality of the order made by the grand jury on 27 March 1953. The second argument, however, was of much greater significance. It was contended that whenever the authorities of a visiting force wished to exercise their primary right in cases falling within the terms of Article VII (3) (*a*) (ii), they had to show first of all whether or not the offence was punishable by the law of the State to which the visiting force belonged. Although the report of the case contains no clarification of this argument, a possible justification for it is to be found in the provisions of Article VII (2) (*b*), which provides—unnecessarily, it is thought[2]—that, in respect of offences punishable by the law of the local State but not by that of the sending State, the local courts should have the right to exercise exclusive jurisdiction. The second part of the argument was that a request for the primary right to exercise jurisdiction under Article VII (3) (*a*) (ii) could not be made *in vacuo*: the request should fall on deaf ears unless some court of the sending state were seized of the case. The decision of the Court on this argument was that there was nothing in the terms of the Article that would compel it to go beyond the wording of the sub-clause, and since there were no further conditions to which the primary right to jurisdiction should be made subject, the request of the military authorities of the visiting force should be respected without any reference to the local courts. It was argued that the intention of the Article was not to confer any jurisdictional immunity on a member of a visiting force, which might be its effect if there were no such guarantee as that for which counsel contended, but to settle possible jurisdictional conflicts by fixing the order of precedence in certain situations where two courts had initiated proceedings against a visiting serviceman for the one offence. The possibility of actual and ultimate immunity is negatived not only by the spirit of the Agreement but also by the terms of paragraph 3 (*c*) of Article VII.

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[1] See above, p. 358, n. 1.

[2] 15 & 16 Geo. VI and 1 Eliz. II, c. 67 (U.K.).

[3] The wording of the sub-section has been adopted as an agreed official minute relating to Article XVI (3) (*a*) (ii) of the Agreement of 19 February 1954 regarding the Status of the United Nations Forces in Japan (*U.K.T.S.*, No. 19 (1954), Cmd. 9229, p. 23).

[4] In the absence of some decisive provision in municipal law, such as that contained in s. 11 (4) of the Visiting Forces Act, 1952, already referred to. It is to be noted that the Status of Forces Agreement contains no provision for resolving a dispute whether the act or omission in question arose out of the performance of official duty: but cf. Article VIII (8) as to civil claims.

[5] *Clunet*, 81 (1954), p. 736.

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[1] See *Allied Forces* (*Czechoslovakia*) *Case*: *Sbírka Rozhodnutí Polních Soudů*, 1 (1941–2), čís. 4; *Annual Digest*, 1941–1942, Case No. 31; Hellenic Naval Court Ordinance, 1942, No. 30 (India). As to offences committed before the incorporation of the accused in the ranks of the visiting force see *Affaire Ray*: *Clunet*, 45 (1918), p. 654; *Stamatopoulos* v. *Ministère Public*: *Bulletin*, 55 (1942), p. 30; *Annual Digest*, 1919–1942 (Supplementary Volume), Case No. 88; *A.J.* 39 (1945), p. 347; see also *R.* v. *Peter*, decided in the Central Criminal Court on 29 July 1943, one of the two cases in which the British courts exercised jurisdiction over a member of the United States forces in the United Kingdom after the enactment of the United States of America (Visiting Forces) Act, 1942. In that case the accused was alleged to have contracted two bigamous marriages within the United Kingdom before enlisting in the American forces.

[2] See this *Year Book*, 27 (1950), p. 205.

It is not possible to extract from the judgment any indication one way or the other on the question whether Article VII (3) (*a*) (ii) may be considered as declaratory of any principle of international law relating to the exercise of jurisdiction over visiting forces. It is too early to forecast how this provision will work in practice. In particular, there is insufficient material on which to base an opinion on the tendency that will be revealed in the day by day operation of the primary right to exercise jurisdiction. It may perhaps be doubted whether military authorities of the visiting force will avail themselves of that right only where the sending State identifies itself with the visiting serviceman in the act or omission which is called in question. The traditional reluctance of those military authorities to surrender control over servicemen under their command makes it likely that the priority of jurisdictional rights accorded to them under Article VII (3) (*a*) (ii) will not be exercised in favour of the local State in cases where there is any reasonable doubt.

VII. *Conclusion*

The examination of the available evidence would appear to support the conclusion that there is no basis for a supposed rule of international law recognizing immunity from prosecution in local courts for members of a visiting force who commit offences either within the limits of their quarters, or while on duty, or against fellow servicemen or their property. The first two of these circumstances have the support of textbook writers over a period of a hundred years or more. There is now in existence a multilateral jurisdictional agreement which may be expected to record the highest common factor of agreement and which passes over in silence the traditional concept of conditional immunity in favour of a radically new system of priorities in the exercise of jurisdiction for certain offences. This modern departure from the theories of writers provides some evidence that those theories did not conform to international law as fully as their emphatic language seemed to indicate.

THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, 1951–54: POINTS OF SUBSTANTIVE LAW.—I[1]

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MARITIME LAW (TERRITORIAL WATERS.[2] INTERNAL WATERS. THE NORWEGIAN FISHERIES CASE[3])

IN the present article an attempt is made to state, and to estimate the effects, direct and indirect, on substantive maritime law—particularly the law of territorial waters, and of internal or national waters—of the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case. The wider and more philosophical aspects of that decision, in so far as they transcend maritime law as such, and have an application in the general legal field, were considered in an earlier article.[4] Except indirectly, however—and then only in part—that article did not attempt to state in any systematic form the findings of the Court on the particular points of *maritime* law involved. These fall into two main sections: the general law of the territorial sea, and the extent and delimitation of that sea.

§ I. THE GENERAL LAW OF THE TERRITORIAL SEA

The law of the territorial sea is essentially a compromise between the necessities and interests of the coastal State in the waters off or near its shores, and the general concern of all States with the freedom of the seas—freedom of navigation, of communication and passage, of reasonable exploitation of the living and other resources, and of use for experiment and research. In whatever is determined to be the territorial sea, the rights and interests of the coastal State take precedence, but that determination must itself be governed by international law unless complete nonsense is to be made of the whole concept of the freedom of the seas—and so also must be the character of the rights to be enjoyed by the coastal State in its territorial sea, and the restrictions to be placed upon the exercise of those rights. These fundamental principles find expression in the decision of the Court in the *Fisheries* case in a number of different ways (and see also under § II, head (A)):—

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[1] Reference is made to the Preface of the author's corresponding article in this *Year Book*, 30 (1953), for an introduction to the present cycle of studies of the jurisprudence of the International Court of Justice, 1951–54, of which this year's article is the second. (The previous cycle, covering the period 1946–51, appeared in this *Year Book*, 27–29 (1950–52). Last year's article dealt with 'General Principles and Sources of Law', as found in the decisions and opinions given in 1951–54. It has not proved possible this year to cover, in a single article, all the points of substantive law relating to particular topics that arose in those decisions and opinions. The article is therefore confined to the points of maritime law, the remainder being held over for next year. As in the first cycle, subsequent articles will cover treaty interpretation and treaties generally, international organizations, and the Court's competence and procedure.

[2] In point of fact, the term that will chiefly be used herein is the 'territorial sea'. This has been adopted by the International Law Commission of the United Nations, and has the advantage of embodying the idea that territorial waters, though under the sovereignty and jurisdiction of the coastal State, are nevertheless part of the *sea*, and consequently retain a maritime character, even though they are 'territorial'. They never completely fall under the land domain, and the coastal State's jurisdiction in regard to them is subject to various limitations and obligations not applicable in the case of its land jurisdiction.

[3] For the points of maritime law that arose in the *Corfu* case, see this *Year Book*, 27 (1950), pp. 27–31.

[4] See this *Year Book*, 30 (1953), pp. 8–54.

(1) *Automatic attachment in sovereignty of a belt of waters (the territorial sea) to any coast, island or coastal territory*

The principle that where any territory is washed by the sea, a portion of that sea not only does, but *must*, attach to the land domain, and be under its jurisdiction, was stated in the *Fisheries* case by Sir Arnold (now Lord) McNair in the following passage (*I.C.J.*, 1951, p. 160) which, though delivered in the course of a dissenting Opinion, sets out a general principle of great importance, the validity of which can scarcely be contested. The point involved was not dealt with by the majority of the Court, but the view expressed is entirely consistent with the decision of the majority, and indeed implicit in it:

> 'To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory. . . . International law does not say to a State: "You are entitled to claim territorial waters if you want them." No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.'

From this principle a number of important consequences follow—for instance:

i. Any cession or other transfer of territory automatically involves a cession or transfer of the appurtenant territorial waters: it is not necessary either to effect, or subsequently to prove, any express or separate transfer of the waters as such.[1]

ii. Similarly, the acquisition of territory which is *res nullius* automatically involves the acquisition of a belt of territorial sea appurtenant thereto. No separate assertion of jurisdiction over such a belt is necessary, nor need any specific display of sovereignty over it be proved, provided there is an adequate display of sovereignty over the land territory.

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[1] It can in fact, generally speaking, be said that no transfer *can* be effected without the appurtenant waters, and that a purported exclusion of the waters would be a nullity in law. This follows from the existence of responsibilities (as well as rights) for the coastal State in the adjacent waters. These responsibilities are of such a character that they must and can only be discharged by the coastal State. However, there might be cases where, owing to the juxtaposition of the transferring and transferee States, and to peculiarities of geographical configuration, certain waters that would naturally pass with the territorial transfer could be excluded and reserved to the ceding State; but an express provision to that effect would be necessary.

iii. Conversely, sovereignty over sea waters cannot be claimed *except* on the basis of their being territorial sea (or internal waters—e.g. in a bay)[1] appurtenant to land territory over which sovereignty exists or is claimed: alternatively a claim to the waters necessarily implies a claim to the adjacent land.[2] Except on this basis, the waters must be high seas, and therefore incapable of appropriation.

iv. Equally, it follows that *exclusive* rights in any sea area can only be claimed on the basis that the area consists of territorial or national waters—for exclusive rights imply and involve a claim of sovereignty. The importance of this point in connexion with claims to exclusive fishery rights and so-called fishery limits will be considered later.

v. Since international law does not permit countries to disclaim sovereignty over the appropriate stretch of territorial sea adjacent to their coasts, it follows that no country can enjoy a faculty to disclaim the responsibilities that international law attaches to the possession of that sea.[3]

vi. It follows from the last two points that a country cannot, by professing to claim exclusive *fishery* limits only, divest itself of the obligations attaching to the administration of the area concerned as territorial or internal waters.

vii. Most important of all perhaps—since it is international law that compels maritime countries to possess territorial waters, it must equally be international law that governs the question of their extent and method of demarcation. Were this not so, States might not only find themselves saddled with responsibilities in respect of indefinite areas of sea, but they would also be in a position to frustrate the objects international law has in view in ascribing a belt of territorial sea to every coast (as to which see *infra*, sub-section (2)) by claiming an extent either so small as to amount to a virtual refusal of territorial waters, or so wide as to render meaningless the concept of a *territorial* sea. Consequently, the obligation to possess territorial waters must entail the principle that the extent and method of demarcating those waters cannot be left to the sole will of the coastal State, but must itself depend on rules of international law to which coastal States must conform.[4]

(2) *Purposes of the territorial sea*

Judge McNair (loc. cit.) quoted a passage from the decision of the Supreme Court of the United States in the case of *United States* v. *State*

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[1] I.e. where there is a closing line, which causes the waters behind it to become internal or national waters.

[2] Thus stated, the point may seem obvious, but it was the basis of a considerable controversy in the *Minquiers and Ecréhos* case.

[3] See also this *Year Book*, 30 (1953), §10 on p. 54.

[4] The necessary character of the connexion between the automatic possession of territorial waters and the obligation to conform to the rules of international law as to the extent and demarcation of those waters, tends to be overlooked, although the Court, in the *Norwegian Fisheries* case, affirmed very positively that the delimitation of the territorial sea could not 'be dependent merely on the will of the coastal State'. Certain States appear to consider that international law allows each country to decide these matters for itself. If this were so, there would be an inherent contradiction with the necessary possession of a territorial belt, since the purposes of the latter would be open to obvious frustration. While no State is likely in practice to claim *less* than international law prescribes, claims to more are frequent, and just as unreal, since few States could guarantee the ability to carry out the obligations involved in an area which is not reasonably restricted. Some authorities have preferred to base the matter on the concept of abuse of rights. Thus Judge Alvarez in the *Fisheries* case (*I.C.J.*, 1951, p. 150) said:

> 'Similarly, if a State adopts too great a breadth for its territorial sea, having regard to its land territory and to the needs of its population, or if the base-lines which it indicates appear to be arbitrarily selected, that will constitute an *abus de droit*.'

of California (1946, 332 U.S. 19, 35), cited and reaffirmed in the later case of *United States* v. *State of Texas* (1950, 339 U.S. 707, 718), and containing an apt statement of the basic reasons for the existence of the territorial sea:

> 'The [territorial waters] rule is but the recognition of the necessity that a Government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And in so far as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores, and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units.'

This passage is valuable, not only for its statement of the principal reasons for the territorial sea, but because it brings out the coexistence of two concepts of equal validity—that of the territorial sea, in which the coastal State has sole jurisdiction, and an exclusive right to the exploitation of the natural resources of the area; and the open or high seas, which are *res communis* and free to all. The passage further brings out the principle that any conflict between these two concepts is a matter to be resolved by agreement and not by unilateral action.[1]

(3) *The possession of the territorial sea involves responsibilities as well as rights*

This point has been brought out under (1) and (2) above. It was made by Judge Alvarez in the *Fisheries* case, as follows (*I.C.J.*, 1951, p. 150):

> 'States have certain rights over their territorial sea, particularly rights to the fisheries; but they also have certain duties, particularly those of exercising supervision off their coasts, of facilitating navigation by the construction of lighthouses, by the dredging of certain areas, etc.'

This pronouncement is of interest, not so much on account of the actual examples given—as to which there may be room for argument—but because of its affirmation of the general principle that the possession of territorial waters is not simply a matter of enjoying rights, but also of obligations and responsibilities. This aspect of the matter is frequently neglected or insufficiently stressed—possibly because the exact character and extent of the obligations and responsibilities concerned may be doubtful or controversial in some respects.[1] But unquestionably they exist; for instance—to give an important example—there is the duty of neutral States in war-time to prevent illicit or unneutral use of their waters by belligerents and to comply with certain obligations of neutrality in such waters. Equally, States have a duty in their territorial waters analogous to that which they have on land, to maintain law and order generally, and to afford a reasonable degree of protection to foreign persons and property from crime and acts of violence. This duty may be less stringent in the territorial sea than it is on land, and may be subject to differences due to the special character of maritime, as opposed to land, territory. But it exists. Any State, for instance, which allowed its territorial sea to be used for the purpose of committing depredations on shipping, or which failed to provide a reasonable degree of protection agains facts of this character, would be failing in its duties under international law—a point often insufficiently realized. The matter is of importance, not only in itself, but because of its bearing on the question of the breadth of the territorial sea. States, even weak States, can reasonably be expected to discharge responsibilities of this kind within a comparatively narrow belt off their coasts; but even powerful States could not guarantee to do so over very extensive areas, or could only do so at the cost of maintaining disproportionately large and onerous patrolling and protective forces.[2]

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[1] It would be possible to go further and say that prima facie this conflict must always, in the absence of any agreed solution, be resolved in the manner most favourable to the principle of the freedom of the seas. Claims by coastal States that would involve a serious derogation from that principle can, in the common interest, only be admitted within very narrow limits, for only the coastal State concerned can benefit from the claim; whereas all States, including coastal States in their 'overseas' capacity, stand to gain from the widest possible application of the principle of the freedom of the seas as *res communis*.

(4) *A claim to exercise exclusive rights within a certain sea area necessarily implies and involves a claim to that area as territorial waters*[3]

This principle, which has a number of significant consequences, was indirectly affirmed by the Court in the *Fisheries* case. The Norwegian Decree that was in issue purported to delimit *fisheries* zones. The Court found that this constituted in fact a delimitation of the Norwegian *territorial sea* (*I.C.J.*, 1951, p. 125):

> 'Although the Decree of July 12th, 1935, refers to the Norwegian fisheries zone and

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[1] Coastal States cannot, for instance, be said to be under any absolute liability to *guarantee* the absence of all obstructions to navigation in their waters, to remove wrecks in all circumstances, &c. On the other hand, they are responsible for instituting and maintaining general measures of precaution and safety, for giving adequate warnings when necessary, and so forth.

[2] It is permissible to doubt whether States with, for example, a coast line of 1,000 miles in length and claiming a belt of territorial sea of 200 miles in breadth always realize that, as a matter of strict law, they would incur international responsibility for affording reasonable protection from attack to all vessels within the resulting area of 200,000 square miles which they claim as being under their sovereignty and jurisdiction. It is probably for this reason, *inter alia*, that certain States have purported to claim these areas purely for the purpose of exercising exclusive fishery rights therein, and not *quâ* territorial waters as such. This is a clear attempt to enjoy the benefits—or one of the chief benefits—of the territorial sea, while disclaiming the accompanying responsibilities. The objections of principle to this type of claim are dealt with in the text under the next succeeding head (4).

[3] Or, of course, internal or national waters; but, in the present context, it is not necessary to discuss this as a separate case.

does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea which Norway considers to be her territorial sea.'[1]

The inference in question is a logical necessity deriving from the fact that the sea beyond territorial waters is *res communis*, in which no exclusive rights—fishery or other—can be claimed or asserted. Hence a *valid* claim to exclusive rights of any kind involves, and in fact *is* (however it may be framed on paper), a claim to territorial waters. To put the matter in another way, a claim to exclusive rights in any sea area can only be *enforced* on a basis of dominion over that area, and this involves that the area consists of territorial or national waters, in which alone a State can possess such dominion and exercise rights of jurisdiction—as to the question of the so-called 'contiguous zone', see immediately below. It follows from this that a State which claims, for instance, exclusive fishery rights in a so-called 'fisheries zone' is doing one of three things. It may in *fact* (whatever its professed intentions) be asserting a claim to deny to foreign vessels the right to the common fishery of a part of the *high seas*. This would necessarily be invalid. Or the State concerned may in fact (and again whatever the form it gives to its claim) be asserting a right to certain waters as territorial waters. On this basis, the claim would obviously not be ruled out *a priori*, as it must be on the other; but its actual validity would depend on whether the waters in question properly came within the category and conception of territorial waters. A third possibility may be envisaged. A claim to, say, exclusive fishery rights in a certain zone *not* claimed as territorial waters, and in respect of which it is denied that any claim to general dominion and jurisdiction is made, may be regarded as amounting to a claim to a 'contiguous zone' for fishery purposes. How far could such a claim be justified under international law as it stands today?

The theory of the contiguous zone. The doctrine of the contiguous zone has not, as yet, been fully received into international law.[3] There are leading maritime States that neither claim, nor formally recognize, such a zone. Nevertheless, there does exist a practice on the part of a large number of States, of exercising certain rights within a limited[1] zone adjacent or contiguous to their actual territorial sea—coupled with a tolerance of this practice, although a number of States do not formally recognize its validity. The contiguous zone is, however, to be distinguished from the territorial sea, both in respect of the particular rights exercisable there, and in respect of the *type* or order of jurisdiction possessed by the coastal State. The two chief differences between the position in respect of the territorial sea and in respect of the contiguous zone are (*a*) that the coastal State has sovereignty over its territorial sea, which is part of its domain—but no sovereignty over any contiguous zone, and (*b*) that the territorial sea is not part of the high seas, and is subject to its own special régime—whereas the contiguous zone is, and remains, part of the high seas, and (subject to certain special rights exercisable therein by the coastal State) falls under the *general* régime of the high seas. From these distinctions, the following consequences flow:

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[1] The Court added: 'That is how the Parties argued the question and that is the way in which they submitted it to the Court for decision.' This was certainly true of the United Kingdom, and it was true in *substance* of Norway. Nevertheless, the final and formal submission of Norway to the Court was 'to adjudge and declare that the delimitation of the fisheries zone fixed by the Norwegian Royal Decree of July 12th, 1935, is not contrary to international law'. In this can be seen a lingering reflection of the illusion that exclusive fishery rights can validly be claimed in special zones that are not either part of the territorial sea or internal waters.

[2] In the present context, no attempt is made to discuss the rights of control on the high seas which a State or group of States might derive from a system of fishery conservation agreed between the countries whose vessels are engaged in fishing a given area, or resulting from an internationally accepted system.

[3] The Hague Codification Conference of 1930 gave very full consideration to the matter, but was not prepared to accept the principle of the contiguous zone, even in a limited form (see First and Second Reports of M. François on the *Régime of the High Seas* for the use of the United Nations International Law Commission, Documents A/CN.4/17 of 17 March 1950 and A/CN.4/42 of 10 April 1951, pp. 28–31 and 44–51 respectively).

(i) *Rights exercisable in the contiguous zone.* The coastal State possesses no *general* jurisdictional rights in any contiguous zone—otherwise the zone would be indistinguishable for practical purposes from the territorial sea. The particular rights commonly exercised and recognized—or tolerated—relate to the enforcement of the coastal State's customs, fiscal and sanitary, and possibly also immigration, regulations. 'Security' has also been propounded as a basis for the exercise of control in a contiguous zone,[2] and is probably regarded by many States as justifying some measure of interference with foreign shipping there. This claim is inadmissible. As was pointed out at the Hague Codification Conference of 1930,[3] international law already recognizes the inherent right of self-defence for all States against actual attack or acts of armed hostility. To go further would amount to conferring on coastal States extensive rights of inspection and control over foreign vessels in the contiguous zone, hardly distinguishable in practice from the exercise of a general jurisdiction, since a very wide and miscellaneous range of matters can be brought under the head of security.

(ii) *Fishery rights in the contiguous zone.* The rights enumerated above, and more or less recognized as being properly exercisable in a contiguous zone, do *not* include any exclusive fishery rights for the coastal State. The matter was broached at the Hague Codification Conference but not proceeded with, since the replies of Governments did not 'make it possible to expect that agreement could be secured for an extension beyond the limits of territorial waters of exclusive rights . . . in regard to fisheries'.[1] The reasons of principle for this attitude are clear, and reside precisely in the fact that the fishery rights claimed would be *exclusive* rights[2] and consequently could not be exercised on the high seas—and, as the draft code on the régime of the high seas prepared by the United Nations International Law Commission recognizes (see reference given on p. 377, n. 1, above), any contiguous zone remains part of the high seas, and does not fall within the territorial sea in which alone exclusive rights may be properly exercisable. The rights admitted for the contiguous zone—customs, sanitation, &c.—are essentially non-exclusive, in the sense that they involve no claim to exclude foreign vessels from the zone, or to prevent their carrying on within the zone all such normal activities as passage, navigation, fishing, exploration, marine research, &c. They merely involve limited powers of supervision and control for the purpose of protecting certain public laws and interests of the coastal State; whereas the purported reservation to the inhabitants of the coastal State of all rights of fishery within a given area of the high seas involves the total exclusion of foreign fishing vessels from that area, or at any rate the forcible prevention of any fishing activities on their part, although such activities are a normal part of those which the nationals of all countries may pursue on the high seas.[3]

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[1] Distances claimed vary considerably, but twelve miles might be taken as a mean. This was also the distance proposed by the Preparatory Committee of the Hague Codification Conference of 1930, and now by the International Law Commission (see its Report for 1953 (Doc. A/2456), p. 19).

[2] See, for instance, the proposals of the Preparatory Committee of the Hague Codification Conference, as cited on pp. 44–45 of M. François's Second Report (p. 376, n. 3, above).

[3] See ibid., p. 46.

(iii) *The status of the contiguous zone and the juridical character of the rights exercisable in it.* The foregoing considerations suggest that while international practice may sanction or tolerate the exercise of certain rights by coastal States in a zone adjacent to their territorial sea, these rights are of a different juridical order from those they are entitled to exercise in the territorial sea. They are in fact not so much rights, as powers—which the coastal State may lawfully exercise if it can, but which foreign vessels are not fundamentally obliged to submit to, except in so far as they must. Comparing the three cases of the high seas, the contiguous zone, and the territorial sea, it is clear that the coastal State possesses no jurisdiction over the high seas, and that any purported exercise of such jurisdiction there, except in respect of its own nationals or vessels, is, in principle, invalid. It is equally clear that the coastal State has complete jurisdiction in its territorial sea, subject to certain limitations (e.g. in respect of the right of innocent passage) imposed by international law. In the contiguous zone, however, although the coastal State may exercise certain specific and limited powers, the basic position of status or régime is that of the high seas, rather than of the territorial sea. The contiguous zone is, and remains, part of the high seas. It is not (like the territorial sea) under the general jurisdiction, sovereignty and dominion of the coastal State, or indeed under such jurisdiction, sovereignty or dominion at all, in any sense; nor do the laws and regulations of the coastal State run there in the way that they do in the territorial sea (as in the land territory of that State). It must follow—and this is the important point—that foreign vessels in the contiguous zone are not basically *subject* to the laws of the coastal State, or bound to conform to them, as they would be if it were the territorial sea; nor are they, in principle, obliged to submit to the control of the authorities of the coastal State, as they would be in the territorial sea. International practice allows, or—more probably—tolerates, that the coastal State should exercise certain limited powers of control in the contiguous zone in order to enable it to prevent *eventual* infringement *within its territory or territorial waters* of certain of its laws. But the foreign vessel is not obliged, fundamentally and as a matter of law, to submit to this control if it can avoid or evade it—whereas in the territorial sea, and subject to the right of innocent passage and certain other limitations, the foreign vessel must, and is legally obliged to, submit to the legitimate and reasonable controls of the coastal State. In short, in the territorial sea the foreigner is bound *voluntarily* to submit, whereas in the contiguous zone he is bound to do so only if compelled. The position is, in fact, analogous to that which obtains in war-time in respect of the exercise by belligerents of contraband control over neutral shipping. The neutral vessel is not bound voluntarily to submit to such control. She commits no offence by evading or avoiding it, if she can. On the other hand, the belligerent is entitled to enforce the control if it can, and equally commits no illegality by doing so. Actual *resistance* by the neutral merchantman (which means *forcible* resistance)[1] is of course illegal—or at any rate it entails a penalty, namely confiscation—irrespective of the innocence of the cargo carried. But mere avoidance—e.g. flight—is not illegal, and entails no penalty, *per se*, though it may be regarded as a circumstance of suspicion, raising a strong presumption of the carriage of contraband.[1] If the foregoing considerations constitute a correct description of the legal order of the contiguous zone, certain consequences may tentatively be suggested as following—(tentatively because the field is still comparatively unexplored):

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[1] See M. François's Second Report, p. 45.

[2] No attempt is made here to discuss what rights in respect of fisheries a coastal State might be entitled to exercise in a contiguous zone as a measure of *conservation* of the fisheries concerned —a matter which is under consideration by the International Law Commission. But conservatory measures are, or should be, essentially of a non-exclusive and non-discriminatory character —directed to maintaining the maximum sustainable yield of a stock of fish, and not to reserving its exploitation exclusively to the nationals of the coastal State.

[3] Another important ground of difference is that fishery interests are generally speaking *private*, sectional, and often local—at any rate they appertain in principle to the non-public domain. It is one thing to exercise certain limited powers outside territorial waters for the protection of the public laws and basic State interests of the coastal State—which is what is involved in such matters as customs, immigration, &c. But similar (and actually even more drastic) action on behalf of private and commercial interests belongs to a different order, and cannot find the same justification.

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[1] The conception of forcible resistance was extended in the case of the *Indo-Chinois* (1941, 1 Ll.P.C. (2nd) 73), decided by the Prize Court of Sierra Leone, to cover an attempt by the vessel to scuttle herself.

(*a*) Foreign vessels commit no offence by, and ought not to be punished for, merely avoiding or failing to submit voluntarily to the control of the coastal State in the contiguous zone, but only if they resist the actual application of such control.

(*b*) It would therefore be illegal—or at any rate of no valid legal force—for a coastal State to make a regulation according to which all foreign vessels must enter the contiguous zone at a certain point, or proceed for examination to a certain spot in it. It is for the coastal State to *apply* its control as best it can, and the foreign vessel is under no obligation to court or come to it.

(*c*) The doctrine of 'hot pursuit' has—or should have—in general, no application to the contiguous zone. As the contiguous zone is high seas, and not under the jurisdiction of the coastal State, the foreign vessel is not, *at the moment*, committing an infraction of the laws of that State, though she may be *going* to do so when she reaches port or territorial waters. It is in order to anticipate this *eventual* infraction that powers of visit, &c., are given to the coastal State. The doctrine of hot pursuit ought not to apply when the vessel cannot, *ex hypothesi*, at the time, be violating the local law. In the territorial sea, the foreign vessel is bound to stop when called upon, and may therefore be pursued on to the open sea if she does not. In the contiguous zone, she is not bound to stop, but is merely bound not to *resist* any action taken by the coastal State to make her stop. Being entitled to avoid or evade the control if she can, she is *a fortiori* not liable to pursuit on to, and arrest upon, the high seas outside the zone, on the ground of mere flight. On the other hand, forcible resistance to the application of control, e.g. by flight or refusal to stop coupled with firing, would seem to justify hot pursuit on to the high seas beyond the contiguous zone.

(*d*) A foreign vessel having been duly examined or inspected in the contiguous zone, the international responsibility of the coastal State is engaged if any further action against, or interference with her, or her voyage, or persons on board her, takes place, unless the examination or inspection has revealed adequate grounds for suspecting an intended infringement of the coastal State's customs, immigration, fiscal or sanitary regulations. (This principle might also be good for the territorial sea, but less obviously and subject to some qualification.)

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[1] See, generally, Oppenheim, *International Law*, vol. ii (7th ed. by Lauterpacht, 1952), §§ 422 and 423, and Colombos, *Law of the Sea* (3rd ed., 1954), §§ 770–2. It would appear that, according to American doctrine, flight, provided it is evident and deliberate, gives ground for capture and confiscation. However, this seems contrary to the logic of the general juridical position according to which the *private* neutral merchant is entitled to trade with belligerents (in the sense of committing no breach of neutrality by so doing), and the neutral Government is not obliged to stop him, though it cannot complain if the belligerent Government stops him by action at sea. This means that the neutral merchantman's venture is not an unlawful one *per se*, and that the vessel is entitled to complete the voyage if possible, by any means short of forcible resistance to the (equally) lawful contraband control of the belligerent.

Summing up, and reverting to the original discussion about the nature of the territorial sea, the juridical status of the contiguous zone is shown to be such that *exclusive* rights—such as the reservation of fishing to nationals of the coastal State—cannot properly be exercised in it. It follows that a claim to exclusive rights—and in particular fishery rights—in any area, can only be based on a claim to that area as *territorial* waters. Alternatively, it implies such a claim, and its validity stands or falls by the validity of the claim to the waters as territorial—i.e. depends on whether they can properly be so claimed.

(5) *The 'historic' basis of territorial waters*

(i) *Historic waters proper.* It has for long been part of international law that, on a basis of long-continued user and treatment as part of the coastal domain, waters which would not otherwise have that character may be claimed as territorial or as internal waters—usually the latter, because, in practice, the doctrine has hitherto been applied mainly to 'historic bays',[1] i.e. by permitting a closing line irrespective of length to be drawn across the entrance to certain bays respecting which a historic claim could be substantiated, thus converting the entire waters of the bay into internal or national waters. The Court in the *Fisheries* case defined historic waters as follows (*I.C.J.*, 1951, p. 130):

> 'By historic waters are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.'

However, there seems to be no ground of principle for confining the concept of historic waters merely to the waters of a bay claimed as internal or national waters. Even if the cases would in practice be fewer, a claim could equally be made on a historic basis to other waters as being territorial or internal, which, but for the historic element, would be part of the high seas. This was conceded in the *Fisheries* case. The Court said (loc. cit.):

> 'The United Kingdom Government refers to the notion of historic titles both in respect of territorial waters and internal waters. . . . In its opinion Norway can justify the

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[1] The judgment of the Court in the *Fisheries* case may be thought to have rendered the concept of historicity in respect of *bays* virtually obsolete, but this is not so: see below, § II (B) (5).

claim that these waters are territorial or internal [*sc.* only] on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force.'

(ii) *Historic systems of delimitation.* The point of real interest regarding historic rights in the *Fisheries* case was that the Court recognized yet another basis of historic title—a right to certain waters, deriving not from a historic claim to a given area of sea, as such, but from a historic system of *delimiting* territorial waters in general which, even if it were otherwise contrary to international law, the State concerned could be said to have acquired a right to employ by long-continued usage and action in that sense, acquiesced in, or anyhow not objected to, by other States.[1] Thus the Court found (ibid., p. 139) that it was

> '. . . led to conclude that the method of straight [i.e. base] lines, established in the Norwegian system, . . . had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.'[2]

(6) *Claims to waters, and the acquired rights or vested interests of other States in the use of those waters for specific purposes*

Some observations made by Judge Alvarez in the *Fisheries* case lend support to the view that where, on the basis that certain waters are part of the high seas, the nationals and vessels of other States have long been accustomed to use those waters for specific purposes (e.g. fisheries or passage), they can either not be claimed as territorial (or internal) waters even though the claim might otherwise be good, or can only be so claimed subject to recognition of the rights and interests concerned, and, consequently, to the continued use of the waters for the purposes in question, as constituting a species of servitude attaching to them. On account of its important implications, this matter was fully gone into in a previous article, as raising a point of general principle, and will not be further discussed here.[3]

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[1] Because this question transcended the particular case of claims to waters and raised the general issue of the right of a State, on a prescriptive basis, to depart from an accepted rule of international law on a given subject, and to apply a different rule, the matter was dealt with last year under the head of 'General Principles', in this *Year Book*, 30 (1953), where a full discussion of the Court's views and their implications will be found at pp. 27–42.

[2] How far this last statement was justified has been considered in this *Year Book*, 30 (1953), pp. 27–42. In any case, it marks the apparent tendency of the Court not to distinguish clearly the two separate questions of the validity of the Norwegian claim on a historic basis, and its validity on the basis of general international law. The whole point about a historic title is that other Governments have (even if only tacitly) acquiesced in it over a sufficiently long period of time, even though it is, or was in its origins, 'contrary to international law'. A historic title only has relevance if there would not otherwise be any good ground of right under general international law.

[3] See this *Year Book*, 30 (1953), pp. 51–53. The case of fisheries is the obvious one. A country may suddenly (as Iceland has done) re-draw its territorial waters on a base-line foundation so

§ II. Extent and Delimitation of the Territorial Sea

(A) THE EXTENT OF THE TERRITORIAL SEA

(1) *The extent of the territorial sea is a matter governed by international law, both as to the breadth and as to the method of delimitation*

This was recognized by the Court in the following passage (*I.C.J.*, 1951, p. 132):

> 'The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to [i.e. *vis-à-vis*] other States depends upon international law.'

While this pronouncement was made specifically in relation to the question of the *method* of demarcating territorial waters, its application to the question of the breadth of those waters is implicit and inevitable, since there would be no object in international law governing such matters as the points and lines *from* which the territorial sea was to be drawn, if it did not at the same time govern the breadth *to* which it could be extended—i.e. the seaward limit as well as the base-line. It would clearly be futile to place limitations on the points or lines from which the territorial sea must start, if all such limitations could be defeated by unilateral and unlimited extensions of the breadth of that sea itself.[1] Judges McNair and Read in the *Fisheries* case made the same distinction between the process of demarcation and the character of the resulting delimitation even more explicitly. Thus Judge McNair (ibid., p. 160):

> 'While the actual delimitation of the frontiers of territorial waters lies within the competence of each State because each State knows its own coast best, yet the principles

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as to take in areas hitherto ranking as high seas in which the vessels of other countries have regularly fished for perhaps over a century, and which may constitute an area of primary importance for those vessels. Another case is that of passage, where, by drawing a base-line between outstanding points, the waters behind the base-line, which have hitherto ranked as territorial, or even as high seas, are converted into internal waters by a stroke of the pen. Yet such waters may have constituted a regular highway of maritime traffic through which there was always a right of innocent passage. It would seem that such a right ought to be regarded as continuing, even though the waters are now internal.

[1] This point is not always fully appreciated. So far as *territorial* waters are concerned, the base-line question only has reality on the assumption of a fixed breadth for the territorial sea, from whatever line it is drawn. On that assumption, the placing of the base-line, and the question whether it consists of the coast, or a line drawn *ad hoc* between certain selected advance points, affects and governs the total extent of the waters that come under the dominion of the coastal State, either as territorial or as inland waters. A pushing outwards of the base-line increases the area of inland waters behind it, and thrusts the outer limit of the territorial waters farther seaward. The total extent of the coastal State's waters is accordingly increased, though the breadth of the actual territorial sea measured from the base-line has remained unaltered. Clearly, if additional *breadth* could be claimed at will, the line from which the waters were measured would become immaterial, except for the purpose of claiming waters as *internal* rather than territorial. But the seaward extension of the outer limit of the territorial sea could be achieved just as well by increasing the breadth of that sea, while continuing to measure it from the coast, as by retaining the same breadth, but measuring it from a more advanced base-line.

followed in carrying out this delimitation are within the domain of law, and not within the discretion of each State.'

Similarly Judge Read (*I.C.J.*, 1951, p. 190):

> 'No question of *res nullius* or annexation arises in the case of the sea. All nations enjoy all rights and all privileges in and over all of the sea beyond the limit of territorial waters. It follows that the power of a coastal State to mark out its maritime domain cannot be so used as to encroach on the high seas and impair these rights and privileges. Its power is limited to the marking out of areas *already subject to its sovereignty*'—(italics added).[1]

Even without these explicit statements, the point would have been implicit in the whole character of the *Fisheries* case. As has been observed above, the principal issue in the case, namely, whether the territorial sea could properly be measured from advanced base-lines rather than from low-water mark along the coast, and if so from what base-lines, would have had no reality, so far as the territorial sea was concerned,[2] if the breadth of that sea depended on the will of the coastal State. A similar inference is to be drawn from the other main issue in the case, namely, whether Norway could claim certain waters on the basis of a *historic* right to apply a particular system of delimitation. Clearly Norway would have had no need to plead historic rights—nor would it have been necessary for the Court to find in her favour on the point, as it did—if the same waters claimed on this historic basis could equally have been claimed by means of a unilateral extension of the breadth of the territorial sea. On this ground also, therefore, the findings of the Court in the *Fisheries* case are clear authority for the view that the breadth of the territorial sea is governed by international law, and is not a matter for each coastal State to determine for itself. But from this there follow certain consequences.

(2) *If the question of the breadth of the territorial sea is governed by international law, then international law must ascribe some definite breadth to that sea in any given case*

The question of the actual breadth of the territorial sea was not in issue in the *Fisheries* case. 'The basic issue before the Court was the correct method of delimiting a territorial sea which both parties agreed to be four miles in breadth.'[3] Suggestions that the Court in the *Fisheries* case 'sanctioned' or endorsed a claim to a breadth of four miles are incorrect, in so far as they are intended to mean that the Court admitted any general principle of a four-mile limit, or even that it pronounced affirmatively in favour of the validity of such a claim in the particular case of Norway. The point was simply not in issue, because the United Kingdom *conceded* Norway's right to four miles, though only on a historic basis. The Court accordingly merely stated (*I.C.J.*, 1951, p. 128) that

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[1] In short, sovereignty over the waters could not be obtained *by* proceeding to delimit them: the delimitation presupposed an area already properly claimable as the waters of the coastal State, which accordingly fell to be delimited.

[2] It would of course have remained relevant on the question of the extent of Norwegian *internal* waters.

[3] Cf. Johnson, 'The Anglo-Norwegian Fisheries Case', in *International and Comparative Law Quarterly*, April 1952, at p. 147—to which article, together with the one by Professor Waldock, to be referred to later, the present writer is very greatly indebted.

> 'The parties being in agreement on the figure of four miles for the breadth of the [*sc.* Norwegian] territorial sea, the problem which arises is from what base-line this breadth is to be reckoned.'

It follows that since Norway's claim to four miles was conceded on historic grounds, the United Kingdom maintained intact its position in regard to three miles as the correct general limit of territorial waters. It is worth noticing, however, that according to the latest view, both the three- and the four-mile principles are really variations (due to historical factors) of a common and still more fundamental standard of measurement, namely, that of the marine league standardized in the seventeenth century as measuring fifteen to the degree, or four modern nautical miles—the three-mile rule being a reduction eventually adopted outside Scandinavia to conform to the cannonshot rule, evolved elsewhere in Europe, to equate the territorial sea with the then, presumed, maximum range of cannon-shot of three miles.[1] The important point, however, is that so soon as it is admitted that international law governs the question of the breadth of the territorial sea, it follows automatically that international law must also prescribe *a* standard maximum breadth, universally valid and obligatory in principle, even though variations may be allowed in particular cases, e.g. on the basis of long continued (historic) usage. If this is not so, then international law would *not* govern the question of the extent of the territorial sea, since there is no practical difference between saying that international law prescribes no standard breadth for that sea, and saying that States are free to determine the breadth as they please.

The marine league today. The question of what the standard maximum mileage for territorial waters is to be put at—subject to variation in particular cases on specific grounds—is too complex to be gone into here, and it does not arise directly on the Judgment of the Court in the *Fisheries* case. It can be said, however, that that case is, by a process of necessary inference, authority for the proposition that international law must and does prescribe such a standard breadth. The fact that, as things are today, States claim, and purport to apply, a number of different mileages for the breadth of the territorial sea, does not disprove this proposition: it merely means that these cases may, some of them, constitute variations of the standard norm that could be justified on special, e.g. historic, grounds; while others merely represent unjustified departures from that norm—departures the validity of which need not be recognized by other States, and which are in fact widely challenged.[1] The contention that whatever the rule is, it is not the marine league, because many States, whatever particular mileage they apply, and even though they apply a number of varying mileages, do *not* apply the marine league, is not acceptable. A law setting up a system of limitation must operate by specifying an *actual* limit—otherwise it has no reality. For the same reason, the cancellation of an existing limit must be accompanied or completed by the substitution of a new one, or else, in effect, limitation has gone. To displace must be to replace. A law might close the route to a given spot without providing any alternative route, because the object might be to prevent all access to the locality. But a law providing that buildings must be of limited height, without also prescribing what the limit was, would have no real meaning. Similarly, if a law cancelled an existing limit on the height of buildings without substituting a new limit for the previous one, this would leave everyone free to build as high as he pleased. In the field of territorial waters, it can fairly be said that *if* international law no longer recognizes the rule of the marine league, it has not replaced it by any other specific limit—for there is even less general recognition for any other *one* limit (be it 6, 9, 12 or 200 miles) than there is for the marine league. On this basis, therefore, international law would no longer govern the question of the breadth of the territorial sea at all. But it has been shown that this is precisely what it must do. The conclusion is inescapable; if international law has not replaced the rule of the marine league with any other one standard breadth, then the marine league rule has not been displaced at all, and still remains. There cannot be a vacuum, or international law has ceased to govern the matter. Hence, if it can be shown—as it can—that at some point the marine league was the admitted general rule, and no other *generally* admitted rule can be shown to have superseded it, then the marine league remains the rule still. Such, in strict law, seems to be the present position.

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[1] Cf. Wyndham Walker, 'Territorial Waters: the Cannon Shot Rule', in this *Year Book*, 22 (1945), p. 210; and Kent, 'The Historical Origins of the Three-Mile Limit', in *American Journal of International Law*, 48 (1954), p. 537.

[1] There can be no doubt that up to 1930, the date of the Hague Codification Conference, the marine league, whether in its three- or four-mile aspect, represented the admitted norm. Few States made wider claims, and these claims had for the most part no basis of validity. Although today many States have departed from the standard of the marine league, this standard is still that of by far the largest single group of States applying any one specific mileage, and it must therefore be regarded as still constituting the sole correct mileage claimable in the absence of special grounds. Few of the claims to a wider mileage can in fact be supported on any such grounds. Generally speaking, in most cases there is no difference between the historical, geographical or economic positions or needs of States claiming 6, 9, 12, 15, 20, or 200 miles, either *inter se*, or as compared with the marine league countries—even if such factors were all admissible to justify more extended claims.

(B) DELIMITATION AND DEMARCATION OF THE TERRITORIAL SEA

(1) *General remarks*

It has already been shown that while the Court in the *Fisheries* case found that it was for the coastal State to delimit its waters and carry out the demarcation, the validity of this operation *vis-à-vis* other States, and as regards the propriety of the resulting claim to certain waters as being territorial or internal waters, depended on international law (see p. 383 above). Given the existence of a definite breadth for territorial waters, it follows that delimitation consists entirely or mainly in the choice of the base-points or lines from which the territorial waters are measured in the seaward direction. Once these are settled, the rest follows automatically.[1] Previous to the *Fisheries* case, both the overwhelming weight of authority and the quasi-universal practice of States had established the coast-line rule—i.e. the line of the low-water mark along the coast—as the correct base from which to measure territorial waters—or, to put it in another way, as the line *along* which a *belt* of territorial sea of a certain width was to be regarded as stretching. Base-lines, in the sense of straight lines drawn across expanses of *water*, between points, headlands or islands, were only accepted in the case of bays of less than a certain width (or at the point where the bay narrowed to that width) and, in the case of groups of islands, if at all, only between islands less than a certain distance apart. This system, often known as the tide-mark system, is better described as the coast-line system, since its essential characteristic is the use of the coast itself as base-line. This, as Professor Waldock has pointed out,[2] remains the case even where closing lines to bays are drawn—since, provided the bays are true bays (i.e. have adequate penetration and are not mere curvatures), a line straight across the entrance is simply a part or prolongation of the general line of the coast at the seaward end of the bay. Accordingly, previous to the decision in the *Fisheries* case, the basic rule, at any rate of general practice, could be called the 'general *line* of the coast' rule. In the place of this well established system—which, in the case of other coasts fully as rugged, broken and indented as Norway's,[1] had given rise to no practical difficulty as regards the delimitation of the territorial sea[2]—the Court propounded a different rule, known as the 'general *direction* of the coast' rule. It would seem, however, that the Court itself did not regard this rule as being either new or, in the strict sense, as actually displacing the tide-mark rule. This important point must now be considered.

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[1] It seems doubtful whether the Court fully appreciated this point, seeing that it based the most important part of its judgment on the supposed validity or lack of validity of various methods of drawing the *outer* (seaward) limit of territorial waters. It considered as impracticable, in the case of such a coast as Norway's, a supposed *tracé parallèle* method of drawing the outer limit, which is in fact never used and never has been. It equally passed over as 'not obligatory by law' the 'arcs of circles' or *courbe tangente* method of drawing the outer limit, which is the one invariably used by mariners, and which is equally applicable whether the line *from* which the belt is drawn is the line of the coast or a series of straight base-lines between particular points. The United Kingdom cited this method because it completely disproved the supposed impracticability of delimiting territorial waters off an indented coast by the ordinary coast-line system. In any case, the method of drawing the *outer* limit, once the starting-line (or inner limit) is fixed has nothing to do with the fixing of the latter, which must be done first and quite indepedently (see also this *Year Book*, 30 (1953), p. 19, nn. 4–6).

[2] 'The Anglo-Norwegian Fisheries Case', in this *Year Book*, 28 (1951), pp. 114–71, esp. p. 151, and also pp. 149 and 155. (The present writer wishes to express his particular indebtedness to this very valuable article—an indispensable guide through the intricate maze of the *Fisheries* decision. Further acknowledgements in the appropriate places will make the extent of this indebtedness fully apparent.) Professor Waldock is the only critic to have pointed out the distinction between a 'general *line*' of the coast principle, and a 'general *direction*' of the coast principle as propounded by the Court. He suggests that had the Court proceeded on the basis of the former principle, but adopting a more liberal interpretation of it, the result 'would have been less difficult to reconcile with the customary law . . . as previously understood'.

(2) *Fundamental nature of the 'general direction of the coast' rule according to the reasoning of the Court*

(i) *Concept of a base-line.* It should be recalled that the international law of territorial waters has always postulated a base-line from which territorial waters were to be drawn, but that base-line was, in general, the coast itself. While the Norwegian type base-line is *straight*, and the coast as base-line is usually not straight, it could theoretically be that a perfectly straight piece of coast generated a straight base-line, by constituting that base-line. Therefore the essential difference between the so-called 'base-line system' and the coastal system is not the mere fact that under the former the base-lines are all straight (though in fact they are). The essential difference is that they are drawn *across water* and not *along* the *coast.* Formerly, base-lines across water were only permissible in the case of certain bays or (more doubtfully) between certain islands.

(ii) *The Court's reasoning concerning base-lines.* Although the reasoning is tantalizingly brief and has largely to be inferred from certain oblique observations, it would seem that the Court regarded the coast-line rule as being itself only one application of a more fundamental rule, of which the Norwegian base-line system was another application—this more fundamental rule being the 'general direction of the coast' rule.[3] Thus, in what would be the normal and commonest case, of a straight, or relatively straight, or moderately or evenly curved coast-line, that coast-line would itself represent the 'general direction of the coast'; and the general direction of the coast would *be* the coast-line. Consequently the base-lines for drawing territorial waters in such a case would be the line of the low-water mark along the coast. Where, however, the coast was much indented, with abrupt curvatures or changes of direction, then the actual coast-line at many points would not represent the *general* direction of the coast—might indeed temporarily run in quite a different, even perhaps an opposite, direction. In such cases, it would (according to the Court's finding) be permissible to smooth out the indentations and specific changes of direction, by drawing a series of straight base-lines across certain stretches of water from point to point, in a manner conforming to the general direction of the coast. In short, the Court treated the *line* of the coast rule as being merely a special case of a superior and more fundamental principle, namely, that of the general direction of the coast—somewhat of a paradox, since usually the line of the coast *is* its direction at any given place.[1] That this was the Court's theory is largely an inference from certain rather brief passages in the Judgment, e.g. the three cited on p. 22 of the previous article in this series[2] (one of which has been reproduced in foot-

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[1] E.g. western Scotland and Iceland, Alaska, Nova Scotia and certain other parts of Canada (see the dissenting Opinions of Judges McNair and Read, *I.C.J.*, 1951, pp. 169–71 and 193–4. The former's is quoted verbatim in n. 1, p. 425, below.)

[2] The 'arcs of circles' or *courbe tangente* method can be applied however complex the sinuosities or indentations of the coast. The process is of a classic simplicity. The mariner fixes the position of his vessel on the chart, and then, using that point as a centre, draws a circle of radius three miles (or whatever breadth is applicable). If that circle cuts into the line of the coast at *any* point, the vessel is in the territorial sea: if at no point, she is outside it. No tracing of the limits of territorial waters on the chart is necessary.

[3] The first and basic allusion to this rule occurs on p. 129 of the decision. It reads as if it

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were a principle that had either been previously mentioned and explained (though it had not) or was something too well known and well established to need any explanation. Actually, hardly any hint or mention of any such rule or idea *as such* occurs in any previous work, judgment or authority on teritorial waters. The passage in question reads:

> 'The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria for any delimitation of the territorial sea.'

However, it is no doubt true that the traditional rule allowing a closing line to be drawn across bays of less than a certain width at the entrance (or at the point where the bay narrows to that width), constituted both a departure from the strict tide-mark along the coast principle and also an affirmation of a 'general direction of the coast' principle, permitting straight base-lines departing from the coast to be drawn across water in certain cases—though, as Professor Waldock points out (loc. cit., pp. 151 and 155), in relation to bays the practice represented a general *line* rather than a general *direction* of the coast rule. In any event, the real feature of the *Fisheries* decision is the very wide extension given by the Court to an idea which, in its origins regarding the matter of bays, was simply a modest variation or departure from a general *tide-mark* rule, and the elevation of this idea to the status of an independent principle.

[1] But it is here that the whole practical difficulty lies. *How much* coast has to be taken into account in determining its general direction, and is the determining factor the general direction at the place in question, or something more general still? How relative the conception of the general direction of the coast itself is, will be seen at once from any inspection of different scale maps of the same coast. For instance, if Norway were taken on the basis of the map of that country to be found in a pocket atlas, it would appear to be possible to draw five or six base-lines averaging from 100 to 200 miles each in length, covering the whole distance of about 800 to 1,000 miles from the North Cape round by Mageroy, Hammerfest, Ringvassoy, Anday, Lofoten, Vega, Fröya, to the neighbourhood of Ålesund, and yet conform to what appeared to be the general direction of the coast, *on that scale*. But a glance at larger scale maps would show that these lines did not even begin to conform to the true general direction in many localities. The fact is that on the really large-scale maps used by mariners, the general direction begins to approximate very closely to the actual direction, even on a broken coast-line.

[2] See this *Year Book*, 30 (1953).

note 3 on p. 388 above). Another of these passages (*I.C.J.*, 1951, at p. 131) reads:

> '. . . all that the Court can see [*sc.* in the Norwegian system] is the application of general international law to a specific case.'

To put the matter in another way, the Court regarded the coast as being itself a 'base-line' (as of course it is), and refused to draw any distinction of *principle* between the line of the coast as a point of departure, and a straight line joining two points across an intervening stretch of water. Both were 'base-lines' (this is of course true): they were merely different kinds of base-lines. One kind was appropriate in certain types of cases, the other in other types of cases. This reasoning appears to underlie the following passage, in which the Court was describing the Norwegian contention which it eventually endorsed (p. 133):

> '. . . the general rules of international law . . . take into account the diversity of facts and therefore, concede that the drawing of base-lines[1] must be adapted to the special conditions obtaining in different regions . . . the system of delimitation . . . characterized by the use of straight lines,[2] does not therefore infringe the general law; it is an adaptation rendered necessary by local conditions.'[3]

The same view may be inferred from another passage (pp. 128–9) in which the Court, after referring to the 'method . . . which consists of drawing . . . the belt of territorial waters by following the coast in all its sinuosities', said that 'This method may be applied without difficulty to an ordinary coast, which is not too broken', and then went on to contrast it with the case of an indented coast, as to which it thought that the 'line of the low-water mark' could no longer be applied (this passage is quoted more extensively below in connexion with the question of the circumstances in which a general straight base-line system can validly be used).

(3) *The 'general direction of the coast' rule in its coast- or tide-line aspect*

This being the straightforward and normal case where the base-line consists of the coast itself, there was little to be said about it in the *Fisheries* case. The following points may, however, be noted:

(i) *Island-fringed coasts* (*the Norwegian 'skjaergaard'*).[4] The Court found that where a continuous island fringe is so closely related to the mainland that the coast of the latter 'does not constitute . . . a clear dividing line between land and sea' on account of the existence of this island fringe, it is the fringe that must be regarded as constituting the true coast-line for the purpose of delimiting the belt of territorial waters. Speaking of Norway, the Court said (*I.C.J.*, 1951, p. 127):

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[1] Here the Court was (*semble*) using the term 'base-lines' in its most general sense, as meaning *any* line (including the coast-line) from which territorial waters were measured.

[2] Here the Court was clearly referring to base-lines in the sense of the Norwegian system.

[3] While the reasoning is clear, the conclusion cannot be regarded as following, for 'necessity' (in the geographical sense) *never* dictates the drawing of Norwegian-type base-lines, as is shown by the example of equally indented coasts, such as those of Nova Scotia or western Scotland, where no difficulty exists in basing the territorial belt on the line of the coast, however broken (see p. 387, n. 1, and p. 388, n. 2, above).

[4] Meaning 'rock rampart' or 'guard'. The English—or Scottish—equivalent is 'skerry'.

> 'The coast of the mainland does not constitute, as it does in practically all other countries,[1] a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the "skjaergaard".'

Consequently it found (at p. 128) that

> 'Since the mainland is bordered . . . by the "skjaergaard", which constitutes a whole with the mainland, it is the outer line of the "skjaergaard" which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities.'

The chief effect of this doctrine, where it is applied, is to convert all the waters between the mainland and the 'skjaergaard' into *internal* waters—whereas they would otherwise have been mainly territorial waters, or even (where the breadth of the intervening waters exceeds twice that of the territorial seas) partly high seas. This has important consequences as regards the right of innocent passage through the waters in question. This right would exist on the basis of their being territorial, but, prima facie, not if they were internal. However, looking at the matter solely from the point of view of the seaward limit of territorial waters *outside* the 'skjaergaard', it becomes necessary to inquire in what sense the reference to 'geographic realities', at the end of the citation last quoted, is to be taken—for in one sense it begs the question. It is true that, unlike the supposed necessity of employing the general straight base-line method of delimiting the territorial belt merely because of an indented coast-line, there may be solid practical grounds of convenience for treating an island fringe as part of the mainland (in addition to the conversion of the intervening waters into internal waters thereby to be effected). Yet, except in those cases where this fringe, or a major part of it, is separated from the mainland by a distance of more than twice the breadth of the territorial sea, virtually the same result (as regards the eventual extent of *territorial* waters claimed *outside* the fringe) would be achieved by separately drawing the territorial waters off the mainland proper, and off the separate islands or groups, in the ordinary way. The real significance of treating the fringe as part of the mainland (apart from the internal waters point) arises precisely when it is desired to adopt a general straight base-line system, *and a decision to do so has already been taken*—for it would be practically impossible to draw such base-lines along a mainland coast as such, if it had an island fringe beyond it, unless that fringe were separated from the mainland by an extent of waters so considerable as to deprive the islands of their character as a true appurtenance of the mainland. It seems to follow that if the Court's reference to 'geographic realities' meant that the treatment of the fringe as part of the mainland was necessary *in order to enable* a base-line system on the Norwegian pattern to be established, this was probably correct in *fact*—though, of course, the reliance on geographic features presupposed and assumed that the employment of such a system already constituted a valid method of delimiting territorial waters where those features existed. In short, the existence of a 'skjaergaard' may justify the use of the straight base-line system in a given case if such a system is a valid one in principle for indented coasts: but it is not a *legal* reason *why* such a system is valid. The point is that however broken a rock or island fringe may be, there is, as has been stated above, no practical difficulty in drawing the territorial waters off it by the application of the traditional rules, i.e. by following the low-water mark along the coast of each island, with, possibly, short base-lines joining islands not more than five miles apart. This in fact is precisely the way in which territorial waters have hitherto been drawn off the western Canadian coast, where the existence of an almost equally notable 'skjaergaard' has not been found to necessitate the use of a base-line system as such.[1] To sum up, it is not the use of a general straight base-line system that is essential to the treatment of a 'skjaergaard'—it is merely that the treatment of a 'skjaergaard' *as one with the mainland* is essential, or almost essential, if a general straight base-line system of delimitation is to be employed in fact.

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[1] The implication that there was something actually unique, or nearly so, about the Norwegian coast cannot of course be accepted. There are many similar formations. Western Canada from Vancouver northwards is a good example.

(ii) *Low- as opposed to high-water mark.* Subject always to the principle that the 'general direction of the coast' rule could find its proper application in certain cases by drawing base-lines across water, and not along the coast, the Court pronounced on the question of what particular line along the coast was to be followed when the coast was in fact used as the base-line. The Court stated (*I.C.J.*, 1951, at p. 128) that it had

'no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides,[2] which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State[1] and clearly shows the character of territorial waters as appurtenant to the land territory.'[2]

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[1] This is not to say that there are no straight base-lines there. The traditional rules have always permitted, or tolerated, the use of such base-lines in certain specific cases. There is, however, all the difference between a system that in principle follows the line of the coast or of any coastal islands, with occasional straight lines across small bays or between islands of a group, not far apart, and a general straight base-line system that makes no use of the coast *line* at all, but only of *points* on the coast as points of departure for base-lines across water.

[2] The low-water mark is almost the invariable rule. Of course, there is nothing to prevent a coastal State from using the mean-tide (or even the high-water) mark if it prefers, because either of these is less favourable to it than the low-water mark.

Although mainly relevant to the case where the coast is the base-line, the issue of low- *versus* high-water mark also has relevance to a general straight base-line system, for though in such a case the base-lines themselves run across water, and not along the coast, they must start and finish at points on the coast, on some island, or at some rock. It would therefore be necessary to determine whether the actual starting place was the low- or the high-water mark at the particular point.

(iii) *The use of drying-rocks and shoals.*[3] The Court gave no finding on this matter but it made certain observations that require to be noticed (*I.C.J.*, 1951, p. 128):

> 'The Parties also agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea. The conclusions of the United Kingdom Government add a condition which is not admitted by Norway, namely, that in order to be taken into account, a drying rock must be situated within 4 miles[4] of permanently dry land. However the Court does not deem it necessary to deal with this question inasmuch as Norway has succeeded in proving, after both Parties had given their interpretation of the charts, that in fact none of the drying rocks used by her as base-points is more than 4 miles[4] from permanently dry land.'

Drying rocks and shoals as points of departure for a straight base-line across water. Despite the agreement between the Parties referred to in the first sentence of the above quotation, it is clear that drying rocks and shoals ought not to be used as points of departure and termination for straight base-lines across water. A Committee of Experts appointed in connexion with the work of the United Nations International Law Commission[5] has drawn attention to the fact that, as base-lines of this kind always constitute the dividing lines between territorial and internal waters, it is desirable that their terminal points should at all times be visible, and should therefore consist of elevations permanently above high-water mark.

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[1] In two respects: it pushes the outer limit of the territorial belt that much farther out to sea, and at high tide it causes the water between the low- and high-tide marks to partake, strictly, of the character of internal rather than territorial waters.

[2] This remark is somewhat obscure in the context. However, the principle that the territorial belt is appurtenant to the land domain is of great importance in connexion with the question of the limits within which a general straight base-line system can be employed, and of the propriety of particular base-lines (see below, pp. 406–9).

[3] These may be defined as elevations of the sea bed which are only uncovered at low tide and are therefore completely submerged at high tide. (The equivalent French term is *rochers et fonds couvrants et découvrants*, or, more colloquially, *des sèches*.)

[4] I.e. within the breadth of the territorial sea, which, in the *Fisheries* case, was agreed to be four miles.

[5] Consisting of naval, hydrographic and geographic survey experts of France, Holland, Sweden, the United Kingdom and the United States. Their Report is contained in U.N. Document A/CN.4/61/Add. 1, of 18 May 1953.

Drying rocks and shoals do not in principle generate any territorial waters, but may cause a bulge in the territorial sea off a coast, if situated within the limits of that sea measured from permanently dry land. This is in effect the point dealt with in the second sentence in the above-quoted passage. It has long been settled that while every island is surrounded by its own belt of territorial sea, this only applies to islands that are permanently above high water. Elevations that are only uncovered at low water do not generate a territorial belt. This applies even if a structure, such as a lighthouse, erected on the foundation of such a rock or bank, is itself permanently above high water[1]—and *a fortiori* to structures erected on the bed of the sea and appearing above the surface. However, it is admitted that if a drying rock or shoal is situated within what would *in any case* be the territorial sea of some coast, or island proper, *as measured from permanently dry land*, the low-water elevation may be taken into account for the purposes of delimiting the territorial sea *of the coast or island concerned*—in which case it will accordingly create a bulge in the seaward direction, greater or smaller according to how near the elevation is to what would otherwise be the seaward edge of the territorial sea.

'*Leap-frogging*.' The object of the limitations italicized in the preceding paragraph is to prevent the practice of so-called 'leap-frogging'. This was the point referred to in the above-quoted passage from the judgment of the Court, on which Norwegian and United Kingdom views differed. If, in delimiting the territorial sea off a coast, or island proper, it were permissible to take account of low-water elevations situated within three miles (or whatever breadth is applicable) *of one another*, instead of as measured from the mainland coast or island proper concerned (or rock permanently above high water), then a series of such low-water elevations in the seaward direction would lead to great extensions of territorial waters at many points. Such extensions can be accepted when caused by a chain of islands or rocks above high-water mark, off a coast, but are inadmissible when the elevations in question are only visible at low tide—unless within the requisite distance from permanently dry land or rocks. The United Kingdom point of view on this matter was endorsed by the Committee of Experts above-mentioned (p. 393, n. 5).

(4) *The 'general direction of the coast' rule in its base-line aspect*

The foregoing paragraphs deal with the basic character of the 'general direction of the coast' rule, and with its application to the case where the coast is itself the base-line. The main feature of the *Fisheries* case must now be considered, namely, the application of this principle where the base-line is a straight base-line drawn across water, and when the territorial sea is measured not from the tide-mark along the coast but from a series of such straight base-lines, forming a system.[1] Two main questions arise: first, what are, in general, the circumstances that justify this particular application of the 'general direction' rule, and the consequent use of a water-crossing base-line *system*; and, secondly, assuming a case where, in principle, the use of water-crossing base-lines is justified, what are the rules to be applied in drawing the actual baserlines, and what conditions must be fulfilled in order to render these valid.

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[1] The position in regard to lighthouses was for some time in doubt. But it is now settled law that a lighthouse *as such* does not generate any territorial waters. The rock or islet on which it stands may of course do so, but only if it stands permanently above high water.

(i) *Circumstances justifying in principle a system of water-crossing base-lines.*

It is sometimes[2] thought that in the *Fisheries* case, the Court gave general sanction to the use of water-crossing base-lines whenever a country wishes to employ them, so long as the individual lines can be justified by reference to, and are in conformity with, the criteria to be noticed under head (ii) below. This idea is not warranted on a correct reading of the Judgment. From a purely geographical point of view, the issue tends to be masked by the fact that, in most countries, the coast-line is the natural (and in some cases—e.g. flat, straight coasts—the only possible) base-line: there is therefore no particular motive for the use of any water-crossing base-line system—and of course the coast-line system is by far the more convenient of the two, for all concerned, as a matter of practical operation.[3] Cases may occur, however, in which, without adopting (or having any justification or need for adopting) a general base-line system for the whole or any particular part of its coast or coasts, a country seeks to draw isolated base-lines here and there across certain stretches of water (the issue is clearer if they are assumed not to be *bays*[4]), with a view to making the enclosed waters internal waters, and (for fishery purposes) securing an additional stretch of territorial sea.[1] The tendency has been to assume that this would be justified on the basis of the Court's findings in the *Fisheries* case.[2] Actually, there is every ground for thinking that, on a correct interpretation of these findings, it is only when the character of a coast-line (or part of a coast-line) *taken as a whole*, justifies the use of a water-crossing base-line *system*, that base-lines other than such as would be legitimate even on the basis of the coast-line rule (e.g. as closing lines to certain bays) can properly be drawn. In short, water-crossing base-lines can, in general, only be employed as part of a system, and if the circumstances justify the establishment of such a system. This question can most conveniently be dealt with in considering what are the factors that, according to the Court's findings, may justify such a system. The points to be considered fall under three heads: geographic, historic and economic.

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[1] Such a system can of course include the use of stretches of coast as the base-line in certain places, and closing lines to bays of a kind that would be justified even on the tide-mark principle (e.g. of less than ten miles at the entrance).

[2] Indeed frequently: but the assumption is hasty. Few countries could really justify the use of water-crossing base-lines as a *general* system; but a number might be able to justify the use of such a system in certain localities. *Quaere*, whether the use of isolated base-lines can be justified in a case not justifying a *system* of base-lines—as to which see the text above.

[3] The point is one that is constantly overlooked. A base-line system means that the authorities are obliged to determine the terminal base-points, publish a description of them and of the intervening lines, and cause them to be marked on charts. Mariners must have an exact knowledge of the points and lines, and carry charts showing them. The coast-line system, however, needs neither determination of any point or line (apart from the closing lines of moderate bays), nor publication, nor anything on the chart. The 'arcs of circles' method enables the mariner to establish his position independently of any of this.

[4] Because a closing line to a bay proper might well be justified even on the basis of the coast-system. This would, even previous to the *Fisheries* case, have been so with bays less than ten miles across.

(*a*) *Exceptional geographical conditions as justifying a straight base-line system.* The Court's findings were so closely related to the peculiar physical conditions of the Norwegian coast that it seems reasonable—in view of those findings—to postulate such conditions as being essential to justify the use of water-crossing base-lines, whether as a system or in isolation, *except* in two types of cases where such base-lines could be drawn even on the basis of the coast-line rule, namely, bays proper and (so the Court seemed to suggest) 'minor curvatures'. As to bays, the Court (at p. 131) pronounced in the abstract (and as an *obiter dictum*—for the matter was not an issue in the case; see further below, pp. 411–14) that 'the ten mile rule has not acquired the authority of a general rule of international law'.[3] The Court did not suggest any alternative limit, but it does not follow (see p. 414 below) that the Court meant to indicate that there was no limit at all. In any case, the Court did not suggest the existence of any special relationship between the right to draw closing lines to bays and the character of the coast—for the right to draw such lines, if of moderate length, existed under the coast-line rule, irrespective of the character of the coast. Therefore what the Court did here was simply to reject the application of the previous (ten-mile) limitation on the length of the closing line. As regards 'minor' curvatures, the Court did not expressly affirm that these could invariably be 'flattened-out'; but it left this conclusion to be drawn from its approving reference (at pp. 129–30) to the practice of 'several States'[1] (identity unspecified) in drawing straight base-lines

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[1] Since the normal effect of any water-crossing base-line is to push the outer edge of the territorial belt farther seaward.

[2] Professor Waldock appears to leave the matter open, on the basis of the Court's pronouncements. The present writer suggests that it is a reasonable inference from the way the Court stressed the peculiar character of the Norwegian coast, *as a whole*, that, except in relation to such a coast, it did not intend to sanction the use of base-lines other than in the case of bays and (possibly) minor curvatures.

[3] It is a fallacy that departures from a norm are destructive of that norm, or indicative of its non-existence. The only correct inference to be drawn from the fact that the practice of certain States does not conform to the existing rule of law is that those States are in breach of the law. Of course it can always be argued that the alleged rule is not a rule. The point is that such an argument cannot validly be based on mere deviations or lack of uniformity. International *practice* is seldom, if ever, uniform on *any* subject. If uniformity were the test, international law would cease to exist. No one who studies the proceedings of the Hague Codification Conference of 1930 can doubt that a rule existed imposing a maximum of ten or twelve miles on the closing lines of bays—indeed, this was actually *more* than many States were ready to concede except on a historic basis. As Gidel pointed out (*Le Droit International Public de la Mer*, vol. iii (1934), p. 537), the very idea of a historic bay assumed *some* maximum on the normal limits of closing lines, and ten to twelve miles represented the maximum ever conceded as a general limit.

> '. . . not only in the case of well defined bays, but also in the case of minor[2] curvatures of the coast line where it was solely a question of giving a simpler[3] form to the belt of territorial waters.'

Apart from these two specific cases of bays proper and 'minor' curvatures, and in particular as regards curvatures that do not amount to bays but equally are not minor—and *a fortiori* as regards irregularities that are not curvatures at all—the Court seems to have thought that the right to draw straight base-lines was very closely, if not inseparably, related to the general configuration of the coast, and to the presence of irregularities and physical peculiarities of an exceptional character. This view seems to be warranted by a number of passages, such as those cited above (see pp. 390–1) concerning the 'skjaergaard', in which reference is made to 'geographic realities' and to circumstances said to differentiate the Norwegian coast from that of 'practically all other countries'. The same basic idea is also to be seen in the following passages, in which certain words or phrases have been italicized. Beginning with several paragraphs of description, in which the extreme irregularity of the Norwegian coast, the number of islets, rocks, reefs, &c., bordering it, and so on, were commented on and stressed, the Court went on (at pp. 128–9):

> '. . . the method . . . which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities . . . may be applied without difficulty

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[1] A very few, actually. One of the striking features of the *Fisheries* case was the elevation of minority practices into general rules of law. Alternatively they were regarded as proof of the non-existence of a rule of law, despite a majority practice in favour of that same rule. Conclusions were based on the practice of 'several States' (p. 129) or of 'certain States' (p. 131) or of 'other States' (ibid.); yet when it came to the practice of the *overwhelming* majority of States in favour of the tide-mark rule, or of a maximum ten- or twelve-mile closing-line for bays, this was apparently regarded as having no weight because *not all* States adopted this practice.

[2] No attempt was made to define what was a 'minor' curvature. Does it depend on the length of the curvature, or on its depth, or on a combination of the two—and if so in what proportions?

[3] Obviously one can always 'simplify' the 'form' of the belt of territorial waters by eliminating that form. The form of territorial waters arises precisely from following the line of the coast. A curve is neither mathematically nor factually more complicated than a straight line. In what way therefore is a belt of territorial waters following a curve of the coast less 'simple' than a belt following a line drawn across that curve? There is only one real difference between the two, which is that the coastal State gets more waters on the one basis than the other; and that, not simplicity, will usually be the true motive for the elimination of curvatures.

to an ordinary coast, which is not too broken.[1] Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjaergaard" along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by a geometric construction. In such circumstances, the line of the low-water mark can no longer be put forward as a rule requiring the coast-line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, *viewed as a whole*, calls for the application of a different method.[2] Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a *rugged coast*. The rule would disappear under the exceptions.'[3]

This is followed, after a certain amount of further discussion, by the passage which makes it clear that the Court approved the drawing of water-crossing base-lines in other cases than those of bays or merely minor curvatures—but again relating the matter to the features of the Norwegian coast (p. 130):

'It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays.[4] The Court is unable to share this view. If the belt of territorial waters must follow the outer line of the "skjaergaard",[5] and if the method of straight base-lines must be admitted in certain cases, there is no valid reason to draw them only across bays as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated *between the island formations of the "skjaergaard", inter fauces terrarum*.'—(Italics added.)

All this is clearly bound up with the character of the 'skjaergaard'. Later, speaking of the necessity for areas claimed as internal waters to be appurtenant to the land and 'sufficiently closely linked to the land domain', the Court said (at p. 133):

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[1] Actually, it never is so applied, because the *tracé parallèle* method, of which the Court was here speaking, is quite unpractical *even on relatively smooth coasts*, and is in fact never used (see above, p. 387, n. 1), and in any case the *tracé parallèle* is only one of several theoretically possible methods of tracing the outer (seaward) limit of territorial waters; it has no bearing on the determination of the base-line from which those waters are to be measured.

[2] That it may *justify* the application of another method is arguable. But it cannot 'call for it' in the sense of necessitating it, as witness the perfectly normal territorial waters using the coast-line as a base, drawn off western Scotland, western Canada and other coasts fundamentally resembling that of Norway.

[3] A misconception—see the preceding footnote.

[4] This, as Professor Waldock points out (loc. cit., pp. 146–7) is not quite accurate. The United Kingdom conceded that base-lines might in certain cases be drawn across formations other than bays proper, but contended that the waters so enclosed must lie *inter fauces terrarum* in a manner analogous to bays. As Professor Waldock implies, the fundamental complaint of the United Kingdom in the *Fisheries* case was that the base-lines in many cases did not merely pass across spaces which, if not actually bays, were at least true indentations or curvatures, but were drawn far outside any such formations, between outlying islets and rocks, enclosing waters having in no real sense the character of inland waters.

[5] See above, pp. 390–2.

> 'This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, *the geographical configuration of which is as unusual as that of Norway.*'

In short, the 'liberal application'—i.e. the drawing of straight base-lines across formations that were neither bays nor mere minor curvatures—was justified because of the geographical configuration of *an unusual coast.* Equally, on the same page, the Court referred with apparent approval to Norway's contention that her base-line system was not an infringement of international law but merely 'an adaptation rendered necessary by local conditions'. The inference would be that such an infringement would exist where local conditions (primarily geographic) did not render the base-line 'necessary'.[1] Finally, the Court in stating its general conclusion on the issue of principle (i.e. as distinct from the question whether certain *particular* base-lines were valid) said (at p. 139):

> 'The Court is thus led to conclude that the method of straight base-lines, established in the Norwegian system, *was imposed by the peculiar geography of the Norwegian coast. . . .*'

The same view emerges even more clearly in the separate (though concurring) Opinion of Judge Hsu Mo. He considered the base-line system to be prima facie illegal under general law, and *only* justifiable in the light of special factors (*I.C.J.*, 1951, p. 154). The inference to be drawn from all this would seem to be that, apart from any right arising on a historic basis, the justification for the use of a system of base-lines must lie in the special character of the coast, but for which Norway could only have drawn base-lines in those cases where this would have been permissible under the coast-line rule.

Conclusion. While it is not altogether easy to draw absolutely definite conclusions, the foregoing citations, the known facts concerning Norway's geography, and the whole circumstances of the case, seem to justify the following summary:

1. Apart from historic rights,[1] a *system* of straight water-crossing base-lines, applied generally and not merely to bays and minor curvatures, is justified only along a coast which, *as a whole* (or along an appreciable part of a coast, which part *as a whole*), presents unusual geographical features that 'call for' the use of such a system.
2. Except as part of a *system*, and in circumstances justifying the use of a system, individual base-lines may not (subject to conclusion 3 below) be drawn, except where this would have been justified on the application of the ordinary 'coast as base-line' rule.

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[1] As to possible economic justifications see below, pp. 400–2.

3. (*a*) Some extension of the closing lines of bays proper may be justified beyond the ten miles previously considered the maximum under the coast-line rule; but it is uncertain how much. The Court substituted no alternative distance for the ten-mile limit which, in a *dictum* that was purely *obiter* and not necessary to the decision of any issue in the case, it declared not to have 'acquired the authority of a general rule of international law'. But it cannot be assumed that the Court thereby intended to remove *all* limitations on the length of the closing lines of bays (see further p. 414 below).

(*b*) Some licence in respect of the flattening out of minor curvatures (where simplification is the sole object) may now be justified, in derogation of the strict coast-line rule, even where the geography of the coast would not justify the use of a base-line system.

(*b*) *The historic element.* It is not necessary to dilate on this. It has always been accepted that claims to special waters, not justifiable on ordinary principles, could be made on a historic basis—in order to prove which, however, not only must an old-established practice be shown to exist, but also acquiescence in that practice (even if only tacit) on the part of other States.[1] The novel aspect of the *Fisheries* case was the historic *justification* pleaded by Norway (and admitted by the Court), not so much for laying claim to any particular area of waters in itself, but for employing a special system or method of *delimiting* waters—leading, of course, *in fact* to a claim to particular waters. This has been fully discussed already in this *Year Book*, 30 (1953), pp. 27 ff. (*q.v.*).

(*c*) *Economic factors.* It is frequently claimed that the Court in the *Fisheries* case included economic factors as one of the grounds which might justify the use of a water-crossing straight base-line system of delimiting territorial waters. There is no doubt that the Court took the economic elements in the case *into account*, i.e. the particular dependence of the Norwegian population in certain localities, on the sea and the products of the sea. But there is nothing to show that the Court regarded this as a determining factor—at any rate in the legal sense—or that it would have been willing to regard the Norwegian base-line system as justified on economic grounds alone, in the absence of legal, geographical and historical factors. The Court does not in fact seem to have regarded the economic elements in the case (though important) as being other than contributory, or as being more than a reinforcement of conclusions arrived at on independent grounds.[2] In particular, the Court seems to have regarded the economic factor—the special dependence of sections of the Norwegian population on fishing—as having a *probative* rather than a directly operative value, for instance as evidence of a long-continued practice of fishing in certain waters, or of employing certain methods of delimitation. The only *general* reference to this economic element appears early in the Judgment in the descriptive passages stating the situation of fact on the Norwegian coast. As one of 'the realities which must be borne in mind', the Court (*I.C.J.*, 1951, at p. 128) instanced the fact that

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[1] The antiquity of the practice may sometimes enable the acquiescence of other States to be *presumed*, provided knowledge of it can properly be imputed to them (see this *Year Book*, 30 (1953), pp. 27–30, and 33).

[2] It is clear that no tribunal other than a commission of conciliation or a tribunal empowered

> 'In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.'[1]

However, when it came to applying this factor to the determination of the legal merits of the *Fisheries* case, the Court—in the only two other passages in which reference was made to the matter—connected it with the historic factor. Neither passage suggests that economic considerations could be adduced as part of the *juridical* justification for adopting a base-line *system* as such. The first merely suggests that such considerations may be taken account of in determining the direction and extent of *particular* base-lines: and the second was related to an actual base-line—the one drawn across the forty-four miles of the Lopphavet basin. In both cases the economic element was adduced as evidence of a historic practice or usage. The first (loc. cit., p. 133) read:

> 'Finally, there is one consideration not to be overlooked,[2] the scope of which extends beyond purely geographic factors: that of certain economic interests peculiar to a region, *the reality and importance of which are clearly evidenced by a long usage.*'

Similarly, with regard to the case of the Lopphavet base-line, the Court

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to decide a case *ex aequo et bono*—in short, no court of law, applying and bound to apply purely juridical principles—could base a finding on economic grounds *per se*, unless these came into the case on some recognized juridical basis, e.g. as a question of non-discrimination, most-favoured-nation rights, or the application of some clause in a commercial treaty.

[1] It is the juxtaposition of this passage with the immediately following one ('Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law') that, more than anything else, has led to misunderstandings as to the basis of the Court's findings in the *Fisheries* case. However, the United Kingdom was far more concerned with the *principles* underlying the way in which Norway delimited her waters than with the actual waters themselves, about which some *ad hoc* arrangement could probably have been come to. Indeed, there was in operation for years a *modus vivendi* between the two countries under which, without prejudice to the views of either side, a great part of the Norwegian claims were, in practice, conceded, and United Kingdom fishing vessels kept outside a certain line, called the 'red line', traced on the chart. It was the Norwegian refusal after the war to continue this *modus vivendi*, and the arrest and fining of a considerable number of United Kingdom fishing vessels, even outside the 'red line', that precipitated matters.

[2] The context makes it clear that what is meant is that the economic element is not to be overlooked in estimating the validity of a *particular* base-line, not that it justifies *per se* the establishment of a *general* base-line *system*.

referred to 'the survival of traditional rights . . . over fishing grounds' and continued (p. 142):

> 'Such rights, founded on the vital needs of the population *and attested by very ancient and peaceful usage*, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.'[1]

The phrases italicized in these passages appear to indicate the true scope which the Court intended to give to the economic element,[2] and make it clear that, for instance, a country could not, merely by reason of the alleged economic needs of some part of its population, put forward a *legal* claim to delimit its waters in a manner not otherwise permitted by international law. This view is borne out by another consideration which, if not a strictly juridical one, is nevertheless material—namely, that the existence of local communities dependent on inshore fisheries is by no means a feature peculiar to (though it may be more prominent in) certain countries. On the contrary, it is a feature common in a greater or lesser degree to all maritime countries; and the prosperity of the country as a whole has very little bearing on the dependence of particular sections of the population on fisheries. The evaluation of economic needs is too subjective an operation to be acceptable as a basis of legal rights. The dangers of the attempt were made graphically clear by Judge McNair in the following passage, with which this aspect of the subject may fittingly be closed (*I.C.J.*, 1951, at p. 169):

> 'That a State has a right to delimit its territorial waters in the manner required to protect its economic and other social interests . . . is a novelty to me. . . .
>
> 'In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.'

(ii) *Criteria for drawing and for determining the validity of individual base-lines, assuming the use of a water-crossing base-line system to be justified in principle.*

It has been shown in the foregoing sections that under the Judgment of the Court in the *Fisheries* case—correctly interpreted—the use of water-crossing base-lines, apart from drawing the closing lines of bays (and possibly the flattening out of 'minor' curvatures), is only permissible as part of a *system* of such base-lines applied to the whole (or some definite portion) of a coast, where unusual geographical or other special (e.g. historical) features justify the application of such a system. Thus the base-line system remains, if not exceptional, at any rate a special case. Assuming that the circumstances justify the use of a base-line system at all, the question will then arise how the *individual* base-lines are to be drawn, and what principles are to be applied in determining their validity as drawn by the coastal State. The Court propounded generally both the existence and the necessity for particular criteria in the following three passages (*I.C.J.*, 1951):

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[1] As to what is 'moderate and reasonable', opinions must vary. The Lopphavet line was forty-four miles long and, according to Judge Hsu Mo, who on the general issue agreed with the Court, involved 'an *obviously* excessive deviation from the general direction of the coast'—(italics added). On any view, the Court's findings on the subject of base-lines have introduced a predominantly subjective element into the law of territorial waters which previously found little place there.

[2] At the most, the pronouncements of the Court on the economic factor might justify the rather more liberal drawing of a *particular* base-line in a particular region, on account of certain economic interests *in that region*. They do not justify the view that economic factors can in themselves afford ground for the adoption of a general system of base-lines.

p. 129: 'The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix criteria valid for any delimitation of the territorial sea.'

p. 137: 'It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. . . .'

p. 133: 'In this connexion, certain basic considerations *inherent in the nature of the territorial sea*, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question'—(italics added).

In the phrase italicized in the last of these passages, there can be no doubt that what the Court had in mind was the supreme and all-governing basic consideration that *ex hypothesi* the territorial sea is *territorial*, and therefore must have, and retain, a close physical relationship with the land domain, to which it is appurtenant. This point was very much emphasized by the Court in laying down the particular criteria to be discussed in a moment: but it can hardly be over-stressed that the territorial sea is not and was never intended to be a means, or vehicle, by which coastal States should appropriate to their exclusive use areas of what are properly (i.e. in their physical nature) high seas.[1] The territorial sea was, as its name implies, intended to be an appendage of the land, closely related to it, and partaking in a certain sense of the nature of the land as well as of the sea—as something necessary to the land without which the land domain would cease, so to speak, to be viable or workable.[2] The territorial sea is therefore essentially a limited and restricted area, instituted for special purposes connected with the land rather than—or at least as much as with—the sea. This basic factor, as the Court said, determines the validity of all delimitations of the territorial sea. A clear recognition of this position on the part of the Court is contained in the following passage (at p. 133) coming immediately after the one last cited above:

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[1] This misconception—that territorial waters are intended as an *enlargement* and not merely as an *appendage* of the land domain and therefore that they afford a legitimate means of encroachment on the *res communis* area of the high seas—is common to all those countries that are maritime in the sense of possessing coasts, but which lack wider maritime interests.

[2] The point is fundamentally a practical one. No State could exist if the very waves breaking on to its shores, the very waters at the point of their flow into its ports, were not under its jurisdiction, but were open to general use for any purpose. Some fringe under the exclusive jurisdiction of the coastal State is necessary, virtually as part of the land. But any extension of the fringe

> 'Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State the right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.'

The four specific criteria laid down by the Court for determining the validity of individual base-lines are really all different expressions of this basic principle of the close dependence of the territorial sea on the land domain. They were that base-lines must (1) follow the general direction of the coast; (2) only enclose waters genuinely possessing the character of internal waters; (3) lie '*inter fauces terrarum*'; and (4) be moderate and reasonable, and drawn in a reasonable manner. These four criteria will now be discussed.

The Court's four criteria for determining the validity of individual base-lines:

Criterion No. 1: The base-line must follow the general direction of the coast. This was expressed by the Court as follows (p. 133):

> '. . . the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.'

It is unfortunate that, as stated, this criterion is seriously lacking in precision. It has already been pointed out that the very notion of the general direction of the coast depends upon how much of the coast is taken into account for purposes of determining the general direction in any specific locality, and consequently upon the scale of the charts employed.[1] Superimposed on this lack of precision another element of uncertainty is added by the term 'appreciable'.[2] The Court itself admitted these difficulties in the only passage in which it gave some interpretation of the concept of

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beyond what is reasonably necessary for that purpose, or any delimitation of it that causes such an extension, alters the character of the waters, which then cease to be truly territorial and become an encroachment on the high seas.

[1] See above, p. 389, n. 1.

[2] This can have three distinct meanings: (1) 'capable' of being detected even if only on careful inspection—this would cover the smallest deviation; (2) 'considerable', 'noticeable at a glance', or 'impossible to overlook'—this would only cover marked deviations; (3) 'noticeable', in the sense of being visible, but without leaping to the eye—this would not cover slight deviations, but would still cover deviations that could not be called large.

the general direction of the coast. In this important passage the Court, speaking of the Lopphavet base-line, said (*I.C.J.*, 1951, at pp. 141–2):

> 'The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, *it is devoid of any mathematical precision.* In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore *one cannot confine oneself to examining one sector of the coast alone,* except in a case of *manifest abuse*; *nor can one rely on the impression that may be gathered from a large scale chart of this sector alone.* In the case in point, the divergence between the base-line and the land formation is not such that it is a *distortion* of the general direction of the coast'—(italics added).

The introduction of the concepts of 'manifest abuse' and 'distortion' constitutes another element of uncertainty. These concepts differ considerably from, and are much more liberal[1] than, the idea of not departing 'appreciably' from the general direction of the coast. Even using that term in the sense of 'considerably', a departure might be 'appreciable' without amounting to a *distortion* of the general direction, or constituting a manifest abuse. One thing seems clear, however, namely, that the Court contemplated that the matter would be assessed on the basis of taking a considerable stretch of coast into account—i.e. on the basis of small-scale charts. On this point Judge Hsu Mo, who agreed with the Court on the principle involved, but who interpreted it quite differently, took almost the opposite view (*I.C.J.*, 1951, at pp. 154–5):

> 'The expression "to conform to the general direction of the coast" being one of Norway's own adoption[2] and constituting one of the elements of a system established by herself, should not be given a too liberal interpretation,[3] so liberal that the coastline is almost completely ignored. It cannot be interpreted to mean that Norway is at liberty to draw straight lines in any way she pleases provided they do not amount to a deliberate distortion of the general outline of the coast when viewed as a whole. It must be interpreted in the light of the local conditions in each sector with the aid of a relatively large scale chart. If the words "to conform to the general direction of the coast" have any meaning in law at all, they must mean that the base-lines, straight as they are, should follow the configuration of the coast as far as possible and should not unnecessarily and unreasonably traverse great expanses of water, taking no account of land or islands situated within them.'

This passage is of great interest because it is a practical demonstration, within the actual scope of the *Fisheries* decision itself, of how Judges of equal impartiality and competence, and who moreover are in agreement on the basic principle, can nevertheless interpret it in diametrically opposite ways, and so as to reach opposite conclusions in the case of a concrete base-line.[1] It will be seen that Judge Hsu Mo rejected the idea that there must be an actual distortion before a line could be said not to conform to the general direction of the coast; he rejected the use of small-scale charts, and thought that the question of direction in any sector must be determined with reference to the coast *in that sector*, and not by taking a greater stretch of coast into account. Finally, his conception of reconciling the use of straight base-lines with the general direction of the coast was, roughly—to give an illustration—that, if one took a semicircle, a system of straight base-lines following the 'general direction' of the semicircle would consist of a comparatively large number of straight lines cutting off small arcs along the semicircle. The Court's interpretation would permit of using only three, or even two, lines, cutting off large arcs, or the closing of the whole semicircle along the diameter. The illustration at the end of this article shows an imaginary stretch of coast with four sets of base-lines drawn according to different concepts of the idea of following the general direction of the coast, depending on how this idea is interpreted; but the results are very different. Nothing could show more vividly the highly abstract and subjective nature of this concept.

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[1] That is, from the point of view of the coastal State—not from that of the common use of the sea.

[2] It is a fact that the formula of the general direction of the coast was not propounded by the Court, but taken from the Norwegian argument.

[3] It can hardly be doubted that, by analogy with the *contra proferentem* rule, Judge Hsu Mo's method of interpretation was preferable.

Criterion No. 2: The base-line must enclose waters genuinely possessing the character of internal waters. It is necessary always to remember the double aspect of a water-crossing base-line, which has not only to serve as a base for drawing the territorial belt (with in general the effect of pushing the outer limit of the belt further seaward), but in addition—and perhaps indeed primarily—to enclose, and to turn the waters between the base-line and the mainland into internal or national waters—waters which would otherwise have been territorial waters, or even, in extreme cases, partly high seas. This has certain consequences. The coastal State has sovereignty and jurisdiction over its territorial sea, but the exercise of this is subjected by international law to limitations and obligations, for instance to afford the right of innocent passage, to refrain from undue interference with foreign vessels, not to assert criminal jurisdiction over acts taking place on board such vessels and only affecting the internal economy and discipline of the ship, and so on. In the case of internal or national[2] waters these restrictions do not, as such, operate. A country's sovereignty over its lakes and rivers, for instance, is not only as complete, but also inherently of the same *order*, as over its land territory. Water-crossing base-lines, however, bring into existence a new type of internal waters,[1] not previously known except where closing lines to bays were drawn—and if the bay was a true bay, its waters could be said in a certain sense to be inland waters, i.e. to be within the body of the land, or behind the general *line* of the *coast* as projected across the mouth of the bay. But an ordinary base-line may enclose waters which, physically and geographically, partake far more of the character of territorial than of inland waters. In view of this, and of the change of status involved (affecting, *inter alia*, the important question of the right of passage),[2] the Court did well to stress the necessity for the waters enclosed by the base-line to be sufficiently closely related to the land to make it reasonable to treat them as internal waters. This criterion was expressed as follows (*I.C.J.*, 1951, at p. 133):

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[1] The two base-lines on which Judge Hsu Mo differed from the Court were those of Svaerholthavet (39 miles long) and Lopphavet (44 miles). Both cut off areas from which numerous smaller bays, fjords, sunds and other indentations led off.

[2] A variety of terms to describe these waters is in use. The term 'inland' is probably best employed as a purely geographical term, to describe waters such as lakes and rivers truly within the body of the land. The term 'internal' or 'interior' waters is not inapt to cover both these waters *and* waters situated between the line of the coast and a base-line, though strictly also mainly suggestive of waters behind the coast-line. 'National waters' is probably the best juridical term for all the waters concerned, and marks the contrast with waters that are only territorial.

> 'Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines *are sufficiently closely linked to the land domain to be subject to the régime of internal waters*'—(italics added).

The Court, however, went on to qualify this passage (in itself a useful reinforcement to the 'general direction of the coast' rule) as follows (ibid.):

> '*This idea, which is at the basis of the determination of the rules relating to bays*, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway—(italics added).

This *addendum*, while valuable on account of its reference to *bays*, thus importing the idea of waters lying within the body of the land and behind the general line of the coast,[3] nevertheless adds a further element of subjectivity

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[1] There can now be said to be three main categories of waters under the jurisdiction of the coastal State: internal or national waters situated behind the actual line of the coast (inland waters); internal or national waters situated in front of the line of the coast but behind a base-line; and territorial waters, which are situated in front of the line of the coast or to seaward of a base-line, as the case may be.

[2] It is not certain that the right of innocent passage may not eventually be recognized in respect of waters enclosed by a base-line, where these are physically indistinguishable from territorial waters and had that status before the base-line was established.

[3] It is worth noticing the interesting reasons given by Judge Read for the existence of rules permitting a degree of enclosure of bays. In a passage which, though contained in an otherwise dissenting Opinion, would probably have met with the full approval of the Court itself, he pointed out that most of the needs of States were met by the possesssion of a belt of territorial waters, and continued (*I.C.J.*, 1951, at p. 168):

> 'Bays however presented a special problem. They penetrated into the country, and were largely enclosed by their headlands. The application of the concept of a belt of territorial waters of fixed breadth to larger bays would bring the sea, both high seas and territorial sea, *into the heart of the country*. It would treat waters *which were in their nature internal*, as part

to a criterion which was itself to some extent subjective in character. Nevertheless, the requirement that the waters enclosed by the base-line must be sufficiently closely related to the land to be truly 'internal', and such as can properly be subjected to the *régime* of internal, and not merely territorial, waters, is a definite one; and it is difficult to see what real room there is for any doctrine of 'liberality' in the matter—for either the waters in question are fairly evidently of the character in question or, if they are *not* fairly *evidently* so, then they should be adjudged not to conform to this criterion, and the base-line enclosing them to be invalid. To what results any other view can lead, is to be seen in such a case as that of the Lopphavet basin, and the base-line enclosing it—and this also shows that the question of the scale of the map used is relevant for the application of this criterion as well; for a small-scale map shows this area as apparently fairly well enclosed by the body of the 'skjaergaard'. Yet it is open on its seaward side, and over forty miles across laterally, i.e. as far as from Dover to Dunkirk, while a person in a boat on the base-line drawn across it would be over fifteen miles from the nearest point on the Norwegian *mainland* coast. Even if such a stretch of water might properly be regarded as territorial, it is not easy to regard it as having any of the essential characteristics of internal waters.[1] But despite the difficulty of applying it, the concept of a sufficiently close relationship with the land to justify treatment as internal waters is valuable, and should at least serve to prevent a base-line being drawn in such a way as to enclose what would otherwise be part of the high seas, or what would be the more seaward portions of the territorial belt if the latter were drawn from the actual coast-line.

Criterion No. 3: The base-line must lie 'inter fauces terrarum'. The idea underlying this criterion is much the same as in the case of the previous one; but it adds a good deal, since it is possible to conceive of waters fairly closely related to the land without lying fully or very markedly between arms of it—though in one sense every water-crossing base-line involves the notion of arms of some sort, or no water could be crossed and the base-line would lie along the coast. If this criterion means anything therefore, it

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of the open sea, and it would bring smugglers and foreign warships and fishermen *into the interior of the coastal State* to the prejudice of its security and vital interests'—(italics added). The phrases italicized in this passage, while entirely in consonance with the idea behind the Court's Criterion No. 2, also serve to emphasize its true *raison d'être*, and the proper limitations on the establishment of base-lines. They help to explain why, in the *Fisheries* case, the United Kingdom objected to flying lines drawn from outlying islet to outlying islet or rock, far outside the entrances to any inlet, and enclosing waters much of which had no semblance of the character of internal waters.

[1] As Judge Hsu Mo pointed out, it would have been possible to enclose a much smaller part of the Lopphavet basin, consisting of waters more closely related to the land, by not joining up the two terminal points of the base-line directly with each other in one sweep across the basin, but by using two or three lines passing through intermediate points nearer the inner shores.

means that the arms must be reasonably prominent. Such an idea, which was not expressed by the Court in very definite language, nevertheless seems to emerge from the following passage (*I.C.J.*, 1951, at p. 129):

> 'It has been contended on behalf of the United Kingdom that Norway may draw straight lines only across bays. The Court is unable to share this view. . . . It is sufficient that they [*sc.* the base-lines] should be situated between the island formations of the "skjaergaard", *inter fauces terrarum.*'

On the assumption that it is reasonable to equate the word 'sufficient' in the above passage with 'necessary'—i.e. that, indirectly, the Court was stating a *condition* of validity—the views expressed by the Court would not be far from the contention actually advanced by the United Kingdom, except that (since a water-crossing base-line must always be drawn between points on land, and must therefore necessarily itself lie *inter fauces terrarum*) the United Kingdom contention really was that the requirement of so lying related to the enclosed *waters*; and, moreover, the United Kingdom considered that these waters should also have the general configuration of a bay. It is clear, however, that even if the United Kingdom had been willing to give up these two latter contentions, great differences of view would still remain as regards the question of whether particular base-lines were properly drawn *inter fauces*. Once again, it is the subjective element of the criterion that causes difficulty. There can be agreement on the principle, but wide divergences of view as to its application in concrete cases, and widely differing results, as is shown by the Court's approval of *all* the Norwegian base-lines without exception, even the most controversial ones. It is worth noticing in regard to the present and the previous criterion, that the chief complaint of the United Kingdom in the *Fisheries* case was precisely that the flying lines drawn far outside the entrances to bays and 'sunds', or other curvatures and indentations, between outlying islets and rocks, enclosed waters not *inter fauces* and not having any vestige of the true character of inland waters.

Criterion No. 4: The base-line must be 'moderate and reasonable', and drawn in 'a reasonable manner'. The Court did not say that the base-line must be moderate and reasonable in *length*,[1] but rather that it must be so in its general character, and must be drawn in a reasonable *manner*. But length is nevertheless an element in assessing what is reasonable and moderate.[2]

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[1] Indeed, it specifically rejected the idea of any fixed limit of length. This seems to result from the two pre-penultimate paragraphs on p. 131 of the Report.

[2] It is theoretically true that quite a short line might fail to conform to some of the other criteria, and might be intrinsically 'unreasonable' in the circumstances (while remaining 'moderate'); while, equally, a very long line might nevertheless conform to the other criteria, and, even if immoderate, might remain reasonable in the circumstances. But prima facie a short line is likely to be moderate and reasonable and such as can be justified on principle, and a long line is not.

The criterion in question was expressed by the Court as follows (*I.C.J.*, 1951, at pp. 140–1):

> 'The Norwegian Government admits that the base lines must be drawn in such a way as to respect the general direction of the coast *and that they must be drawn in a reasonable manner*'—(italics added).

Again, in approving of the Lopphavet line, the Court gave as one of the grounds (p. 142) that it was 'a line which . . . appears to the Court to have been kept within the bounds of what is moderate and reasonable'. It is a reasonable inference from the first of these passages (or would be if it stood alone) that a base-line might respect the principle of the general direction of the coast and yet not be drawn in 'a reasonable manner'. This could be the case, for instance, if a line was of unreasonable length, though acceptable in regard to general direction. However, the second passage, which related in fact to a line 44 miles in length[1] enclosing an area of water which can variously be estimated at 900–1,200 square miles, shows the extremely uncertain character of the idea of reason and moderation when applied to a concrete case.[2] This second passage may be contrasted with Judge Hsu Mo's method of dealing with the Svaerholthavet base-line (39 miles long). In a statement in which, incidentally, he brought out precisely the objection so often felt to the base-line system, as a disguised method of extending the territorial sea, instead of enclosing genuinely internal waters, he said (*I.C.J.*, 1951, at p. 156):

> 'If the closing line over Svaerholthavet is not the closing line of a bay,[3] it must be just one of the straight lines joining one base-point to another. In that case I fail to see how that line can be considered to conform to the general direction of the coast. In order to follow the general configuration of the coast, it should take into account at least some of the points which serve as the starting or terminal points of the closing lines of the bays now enclosed by the long line in question.[4] To leave out all the points on land which interpose between the two extreme points Nos. 11 and 12 and to enclose the whole concavity by drawing one excessively long line *is tantamount to using the straight base-line method to extend seaward the four-mile breadth of the territorial sea.* The application of the method *in this manner cannot in my view be considered as reasonable*'—(italics added).

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[1] Professor Waldock (loc. cit., p. 146) thinks it reasonable to take into account the Norwegian prolongation of this base-line to a further terminal point, making a total length of over sixty miles and an enclosed area that could be estimated at as much as 2,000 square miles.

[2] Judge Hsu Mo characterized this case as involving an 'obviously excessive deviation' (see ibid.).

[3] Judge Hsu Mo of course did not regard the Svaerholthavet as a *bay*, whereas the Court did. Even if the Court had not, however, it would probably not have rejected the base-line, whereas Judge Hsu Mo *might* have admitted it as a closing line to a *bay*, though not prepared to do so otherwise. The point is a nice one.

[4] Seven other inlets opened out of the Svaerholthavet. Judge Hsu Mo was here referring to the closing lines that might have been (but were not) drawn across these other inlets, which would have left a considerable part of the Svaerholthavet outside the base-lines, as territorial sea. But the long closing line across the whole Svaerholthavet enclosed *all* the area as *internal* waters.

The interest of this passage is that Judge Hsu Mo did not think it drawing a base-line in a reasonable manner to enclose an opening into which no less than seven other openings debouched, instead of following the coast round by closing these other openings—or some of them at least: and he put his finger precisely on what will often be the real object of a given base-line. However, the difficulty inherent in any estimate of what is moderate and reasonable in a base-line is not merely the subjective one: it is also a question of the premises—of the point of departure. What may seem 'moderate and reasonable' from the point of view of the coastal State, may not seem so to other States, particularly those whose nationals may have been accustomed for many decades to fish in the waters that, by a 'liberal application' of principles already in themselves liberal, have been withdrawn from the general and common use, and given over to the exclusive service of a purely local interest. As Professor Waldock has pertinently said (loc. cit., at p. 150):

> '. . . reasonableness is again a subjective test, being dependent on the scales and standards which are adopted *and on the weight given to the interests of other States in the freedom of the seas*'—(italics in the original).

However, the first of the passages about reason and moderation quoted above from the judgment of the Court does at any rate establish that this requirement is an independent one, *additional* to the others, even if it may be the case in practice that a line which conformed to the other criteria could be expected, as a general rule, also to conform to that of reason and moderation.

(5) *Bays, and island groups and formations*

These topics are placed under a separate rubric because of certain technical difficulties in relating them directly to the Court's 'general direction of the coast' rule, but something has already been said about them under that head.[1]

(i) *Bays.*

It is not always realized that the so-called ten-mile bay, i.e. the question of the correct limit for the length of the closing line of bays, was not really in issue in the *Fisheries* case, because the United Kingdom Government (see Point (5) of the United Kingdom Conclusions in the case)[2] expressly conceded on *historic* grounds 'all [Norwegian] fjords and sunds which fall within the conception of a bay as defined in international law . . . *whether the proper closing line of the indentation is more or less than 10 sea miles long*'—(italics added). Therefore the only conclusions presented by the United Kingdom on the subject of bays (see Points (6) and (7) of the United Kingdom Conclusions)[3] related to the definition of the *concept* of a bay according to international law, and to the correct terminal points at the entrance between which the closing line should be drawn, *if any were drawn at all.* But no conclusion as to the *length* of this closing line was presented, because the issue on that subject had been avoided by the admission, on historic grounds, of Norway's claim to all her fjords and sunds having the character of bays, irrespective of their width at the entrance.[1] It was therefore, strictly speaking, not necessary for the Court to pronounce itself on the question of the length of the closing line at all. Moreover, it did so in such a way as to leave the law on the subject in a condition of far greater uncertainty than before. After stating that the United Kingdom Government conceded Norway's bays 'only on the basis of historic title', the Court proceeded (*I.C.J.*, 1951, p. 131):

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[1] See pp. 390–2 and 395–400 above.

[2] *I.C.J.*, 1951, at p. 121.

[3] Ibid., p. 122.

> '. . . it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law.[2]
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> 'In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently the ten-mile rule has not acquired the authority of a general rule of international law.'

Being *obiter*, and not made in relation to any actual issue in the case, this pronouncement *decided* nothing in the operative sense—since there was nothing to decide on the question of the length of the closing line for bays, i.e. as being necessary for settling an actual issue between the Parties. The question was not really before the Court at all. Consequently this part of the Court's Judgment has no direct effect on the previous law on the subject, and a few brief remarks as to the latter may therefore be permitted.

Previous law as to the closing line of bays. While it may be admitted that State practice on this matter was less uniform than in regard to the application of the coast-line rule for measuring the territorial belt, and the issue was, in part, masked by the fact that many claims to bays more then ten miles wide were conceded on *historic* grounds,[3] there can, as Professor Waldock points out,[4] be little doubt as to where the great weight of authority lay, as expressed in the writings of jurists, the proceedings and codes of the learned societies, the replies of Governments in connexion with the

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[1] The point admits of no doubt, for the fact that there was no issue on the length of the closing line was specifically emphasized in the speeches delivered on behalf of the United Kingdom on 25 and 27 September and 18 October 1951, at the oral hearing in the case.

[2] This seems to be a misunderstanding of the United Kingdom position, despite the clarity with which this had been explained in the speeches. Naturally the United Kingdom had not given up its *view* about the ten-mile bay rule. But it was no longer necessary to put forward any *contention* on the point, and therefore, for the purposes of the case, the contention *had* been given up.

[3] In so far as some of these claims were *not* justified on historic grounds, they remained mere claims. A claim to have a right to depart from or go beyond the normal practice, is neither evidence for, nor constitutive of, any such right. Such claims are, in their origin at any rate, simply *claims*, and no more.

[4] Loc. cit., pp. 138–9.

Hague Codification Conference of 1930, the other preparatory work for that Conference, and finally the proceedings of the Conference itself. Three propositions can be put forward as representing the general view, and to all intents and purposes the existing law, namely (1) that except in the case of *historic* bays, international law imposed *some* definite limit on the permissible length of the closing line of bays;[1] (2) that this limit was of the order of ten to twelve miles; (3) that even this represented a concession on the part of those States that regarded twice the breadth of the territorial belt—i.e. in effect six miles—as the natural and proper limit (because then, even without a closing line, the whole of the waters at the entrance would in any event be territorial).[2] The position was summarized in the Observations appended by Sub-Committee II of the Hague Conference to the Article embodying the ten-mile rule for bays as follows:

> 'Most delegations agreed to a width of 10 miles provided a system were simultaneously adopted under which slight indentations would not be treated as bays.'

The proviso of course arose, precisely, from a fear that to allow the closing of bays more than twice the breadth of the territorial belt at the entrance would lead to a practice of drawing closing lines across openings and curvatures not properly bays at all—i.e. to a general base-line system.[3] In short, as Professor Waldock sums it up (loc. cit.):

> '. . . most delegations were prepared to accept a ten-mile limit, *instead of a smaller limit*, as the general rule only if a bay were to be so defined as to make it impossible for States to treat minor curvatures as bays. The clear implication is that the majority were entirely opposed to any system of straight base-lines drawn from point to point along the coast regardless either of the length of the lines or of the depth of the curves in the coast'—(italics in original).

In view of this, to say that international law as it stood in 1930—and for that matter equally in 1951—did not, leaving aside the case of admitted historic rights, impose a rule of a ten-mile limit as a *maximum* (to even as much as which, not all States were prepared to agree without qualifications) seems difficult to reconcile with the facts. Indeed, the only sense in which the ten-mile rule might be said, in the words of the Court, not to have

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[1] As Gidel pointed out (op. cit., vol. iii, p. 537), the very existence of a category of *historic* bays is proof of a rule imposing some limit on the closing lines of bays not coming within the historic category, or no historic claim would ever be necessary.

[2] It is a matter of great interest in relation to the general base-line question that, according to the observations on the ten-mile bay provision in the Report of Sub-Committee II of the Hague Conference, this group of States put forward the principle of twice the breadth of the territorial sea because

> '[they] were afraid that the adoption of a greater width . . . might undermine the principle enunciated in the preceding article [i.e. of the tide-mark along the coast] so long as the conditions which an indentation has to fulfil in order to be regarded as a bay remain undefined.'

In other words, it was foreseen that an attempt to substitute a system of straight water-crossing base-lines for the coast-line rule might be made, by drawing lines across indentations and curvatures that were not properly bays, on the pretext that they *were*—in which case the greater the length of the line allowed for bays, the greater the danger of a general departure from the coast-line principle.

[3] See the preceding footnote.

'acquired the authority of a general rule of international law' was in the sense that not all States were fully prepared to agree to *as much as* ten miles. At least it can be stated with absolute certainty that there was no general consensus of opinion for permitting ten to twelve miles to be *exceeded*, other than on a historic basis.

Position resulting from the Court's pronouncement on the length of the closing line for bays. While, for the reasons already given, no directly operative effect can be ascribed to this pronouncement, it has naturally been relied upon in all those quarters that are concerned to undermine the traditional law of territorial waters, as justifying the view that, provided an opening *is* a bay,[1] a line can always be drawn across its entrance, however long. It is not of course possible to say what the Court actually intended, but it does not logically follow that because it rejected ten miles as a maximum, it thereby meant to imply that there was *no* limitation on the closing length of bays, and that henceforth a base-line could automatically be drawn across any bay. Judge McNair made this point very well when he said (*I.C.J.*, 1951, at p. 164):

> 'But the fact that there is no agreement upon the figure does not mean that no rule at all exists as to the closing line of curvatures possessing the character of a bay, and that a State can do what it likes with its bays. . . .'

It must therefore be assumed, at the least, that in principle bays are as much subject to the 'general direction of the coast' rule as any other form of opening or curvature,[2] and that the closing lines across bays must, like any others, conform to the four criteria laid down by the Court for determining the validity of all individual base-lines.[3] However, while this must be the position of principle, the difficulty of implying any practical limitation from it in the case of bays, is precisely that a bay, if properly such geographically, constitutes by its very nature a formation that inherently satisfies certain of the criteria in question. Generally speaking, for instance, a line across a bay at the entrance does follow the *general* direction of the coast, if the bay itself is ignored, and provided its size is not so great that all true relationship between its *fauces* is lost. Again, a bay is precisely the geographical formation that must by its nature lie *inter fauces terrarum*. On the other hand, a bay (even though more or less automatically satisfying these particular conditions) may be too large for a great part of its waters to possess genuinely the character of internal waters, while the line drawn across its entrance may well be of such a length that it can hardly be called 'moderate and reasonable'. There is consequently still room for the play of limiting factors on the length of the closing lines of bays, though the pronouncements of the Court on this and the related points make it impossible to say what the limit would be. Professor Waldock suggests the pessimistic conclusion that while the Court 'has not . . . made the size of a bay wholly irrelevant', it would only be in the extreme case of a bay the size of which was so great that in effect it was a bay only in name (e.g. the Bay of Biscay), that the limiting factor would apply, i.e. (loc. cit., p. 156) where

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[1] Professor Waldock (loc. cit., pp. 141–2 and 155) demonstrates conclusively that the Court did not abandon the idea of a bay as a specific legal concept governed by certain rules of international law peculiar to bays as such. But it gave no definition of a bay considered as a geographical configuration, though it ruled that one indentation, the Svaerholthavet, was a bay, while another, the Lopphavet, was not. In Point (6) of its Conclusions in the *Fisheries* case, the United Kingdom put forward a definition of a bay as follows (*I.C.J.*, 1951, p. 122):

> '. . . the definition of a bay in international law is a well marked indentation whose penetration inland is in such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast.'

A more precise definition is proposed in the Report of the Committee of Experts, referred to on p. 393, n. 5, above, to the effect that a bay is

> '. . . an indentation of an area as large as or larger than that of the semi-circle drawn on the entrance to that indentation.'

A rougher definition, based on the same idea, would be that the penetration must be at least half the width at the entrance.

[2] A bay was indeed, previous to the *Fisheries* case, the chief example of the 'general direction of the coast' rule, in any of its applications other than the line of the coast itself (see above pp. 387–9).

[3] Indeed, the Court specifically took Criterion No. 2 (close relationship with the land domain and susceptibility to treatment as inland waters) from the case of bays (see above, p. 407).

> '. . . the shores are so far apart that they must be regarded as separate *coasts* instead of merely the separate *arms* of an indentation in a single coast. In other words, [*sc.* the question is], when is a curvature, which otherwise has the proportions of a bay, so large that it must be regarded as forming two distinct coasts and that a line across the mouth would not conform to the "general direction of the coast" of the State concerned'—(italics added).

The present writer prefers to put it in the following way: that on the basis of the Court's pronouncements, a closing line across a bay cannot validly be drawn where the size or character of the bay is such as to make it incorrect to treat the whole of the waters of the bay as inland waters, and if the closing line could not be regarded as a moderate and reasonable one. The type of case cited by Professor Waldock would be an obvious example, but it would not necessarily be the only one.

Historic bays. It is clear that unless the future practice of States retains the idea of some kind of fixed limit for the closing lines of bays (though not necessarily ten miles) in all those cases where historic factors do not afford grounds for claiming a wider limit, the pronouncement of the Court, by rejecting one fixed limit without imposing another, must considerably reduce the importance and scope of the historic bay principle. But it is difficult entirely to share Professor Waldock's view on this point (loc. cit., p. 156) that 'there is now no room left for the classical distinction between historic and other bays'—(though, if it were so, then, as he says with complete justice, it would be 'a measure of the divergence of the law laid down by the Court from the traditional law'). However, the historic bay is so much a part of traditional international law that it is difficult to regard it as having been swept suddenly out of existence by an *obiter dictum* not necessary for the decision of any issue in the case, and merely to the effect that a ten-mile maximum is not imposed by international law. Pending something more definite than this, it must be assumed that the historic principle remains—and if this is admitted, it follows at once that international law, even if it does not impose a ten-mile limit, must still impose *some* limit, for if there were no legal limitation on the size of bays all reason for claiming a bay on historic grounds would disappear.

(ii) *Island groups and formations.*

The case of an island fringe or 'skaergaard', or equivalent formation, which is a feature of a number of coasts, has been discussed above (pp. 390–2), where it was shown that the Court authorized the treatment of such an island fringe as one with the mainland coast, entailing certain consequences as to the status of the intervening waters. There remain certain further points.

(*a*) *The ten-mile rule in its application to island groups.* The question of island *groups* or archipelagos, whether coastal or oceanic, is really a different one from that of an island coastal *fringe*. The Court tended to identify the two questions, and this led to difficulties. The Court began by saying (*I.C.J.*, 1951, at p. 131):

> 'The Court now comes to the question of the base lines across the waters lying between the various formations of the "skjaergaard". Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.'

This description of the United Kingdom attitude was not quite accurate.[1] However, the Court went on (ibid.):

> 'In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagos to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), *have not got beyond the stage of proposals*'—(italics added).

It is true that the so-called 'attempts' had not got beyond the stage of proposals. But in what sense? To 'attempt' a proposal for *limiting* lines drawn between islands of a group to ten or twelve miles, presupposes that suggestions for *exceeding* that distance have been made. But in fact none ever had. The opposition was to proposals for a distance of *even as much as* ten or twelve miles. The Court's reasoning on this point is difficult to follow. The facts are that in the beginning, States applied the ordinary rule of a territorial belt round all the *individual* islands of a group, separately. If the islands were close enough, these waters *ipso facto* overlapped and made a 'zone'. If not, there was a gap of high seas between them. No suggestion was made for treating groups as a *unit* for territorial waters purposes, with a belt of territorial sea round the unit as a whole, based on lines joining the individual islands, and with an interior zone of national waters within the islands and the base-lines. At the next stage (i.e. about the period of the 1930 Conference), there was a movement in favour of base-lines joining islands in a group, if sufficiently close, but many States still did not subscribe to the idea, while those that favoured it did so only on the basis that there was to be a definite limit of twice the breadth of territorial waters, or of ten or twelve miles, for such lines. Also, the waters inside the lines were to be territorial, not internal. However, nothing came of this at the 1930 Conference, and subsequent State practice has hardly altered at all in the direction even of drawing any lines between the islands of a group. *In short, the proposals that were not proceeded with were proposals for drawing base-lines between islands, not proposals for extending them to beyond ten miles.* Yet from this the Court argued not only that such lines could be drawn, but also that there was no limit on their length, because the matter had not 'got beyond the stage of proposals'. This reasoning is hard to accept. The fact that proposals for going *up to* a certain limit, as a maximum, have not got beyond the stage of proposals, is a ground for remaining within those proposals, rather than for exceeding them.[1] The Court reasoned as if the drawing of base-lines joining islands was an accepted State practice, and all that had not been accepted were proposals for limiting the length of the lines; whereas, in fact, *general* State practice had not even accepted the idea of drawing such base-lines at all, and *a fortiori* had not accepted that they should be of unlimited length.[2] In these circumstances, and seeing that the question of *groups* of islands, as such, was not strictly in issue in the *Fisheries* case, it must still remain an open question how close together islands must be, in order that they can be joined up as a group with an interior zone of either territorial or internal waters. The Court's decision must be regarded as confined to the quite different case of an island fringe or 'skjaergaard' along a coast; and here this decision is of course authority for the three propositions (1) that such a fringe can be treated as one with the mainland coast, the intervening waters being, or becoming, internal waters; (2) that the territorial belt can, in consequence, be drawn to seaward of the island fringe; and (3) that where a base-line system is employed for this purpose, there is no specific limit on the length of the lines to be used, though they must conform to the four general criteria laid down by the Court for determining the validity of *all* base-lines (see pp. 402–11 above).

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[1] See Waldock, loc. cit., p. 147: 'In any event, the United Kingdom, having admitted Norway's historic title to fjords and sunds, conceded that the base-lines along the skjaergaard need not be limited in length to ten miles. Its complaint was that the 1935 lines are drawn arbitrarily from islet to islet and pass outside the entrances of the fjords and sunds, enclosing sea areas which are not inland waters.'

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[1] The Court's reasoning would have been perfectly valid if, for instance, there had been in existence a rule permitting islands in a group up to fifteen miles apart to be joined by base-lines, and attempts to reduce this distance to a maximum of ten had not got beyond the stage of proposals. But the exact reverse was the position. The Court, however, seems to have assumed that there was in principle no reason why islands in a group should *not* be joined, and *consequently* that there was no limit on the length of the lines, unless an accepted limit could be shown to exist. It is fundamentally a question of approach. One approach seeks and admits only what is positively established or permitted by international law; the other inquires what international law prohibits, and admits anything not positively forbidden. But in any case international law does prohibit, *in principle*, anything involving an encroachment on what would otherwise be high seas.

[2] The Court need not really have dealt at all with the question of island *groups*—which was not necessary to the decision, any more than was the pronouncement concerning the ten-mile rule for bays. All tht was necessary was to deal with the question of an island *fringe* along a coast. Once it was decided that this could be treated *as if it were the mainland*, there ceased to be any specific problem about islands, as islands. The islands of the fringe simply became projections or indentations of a *coast*, and whatever base-lines were permissible along a coast were permissible along the island fringe.

(*b*) *Straits. The question of island channels and passages.* The Court's decision about the treatment of an island fringe or 'skjaergaard' (see above, pp. 390–2) may raise difficulties as to the right of passage through straits or channels formed by coastal islands. If the island fringe is treated as one with the mainland, the waters become internal waters, so that unless the right of passage can be regarded as automatically reserved in such cases, the question of the circumstances in which it is permissible to treat an island fringe in this way becomes a serious one. The grounds given by the Court in the *Fisheries* case for treating the 'skjaergaard' as one with the Norwegian mainland (see above, p. 391) were not very explicit. The Parties had proposed quite different criteria, the United Kingdom maintaining that the test should be whether such action would only tend to enclose waters already naturally internal in character, and not used for coastwise navigation, or whether it would also enclose waters that were so used; and Norway contending that the test was whether the intervening waters, between the mainland and the fringe, operated as a unifying or a seperating element—a test that comes down largely to a question of distance.[1] In effect the Court adopted this test, and (assuming the validity of the basic theory) its application in the *Fisheries* case was probably not unjustified. Applied on other coasts, also island-fringed, but where the intervening distances are greater, the effect on passage rights would be serious. The proceedings of the Hague Codification Conference of 1930 show clearly[2] that States were interested in the question of preserving passage through island channels. On the one hand, they were conscious that the matter must not be pressed too far, since although in one sense all island channels are connecting links between parts of the open sea, many are not necessary and are not used for this purpose, and lead more essentially to purely inland waters. On the other hand, one of the main objections made to having a special régime for island groups and archipelagos, and to treating these as a unit, was precisely the undesirability of turning navigable channels between islands into inland waters, with the consequent exclusion of passage rights. This, moreover, was the basis of the view that even where such groups could properly be treated as units, with a belt of territorial sea round the group as a whole, the waters within the islands and base-lines must be regarded as *territorial*, not internal (see p. 417 above).

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[1] As Professor Waldock points out (loc. cit., p. 157), the difference between the Parties consisted in looking at the intervening waters from the point of view of a coastal State or from the international point of view.

[2] The reader may be referred to Professor Waldock's account, loc. cit., pp. 144 and 157–8.

Inland navigation. The 'Indreleia'. The Court need not have pronounced on this question, because the United Kingdom virtually gave up its original contention that the '*Indreleia*'—a long navigable coastwise passage through the Norwegian 'leads' between the islands of the 'skjaergaard'—should, because of its character as a strait (or the equivalent of a strait) used for international navigation, be treated as territorial, not internal, waters. However, the Court said (*I.C.J.*, 1951, at p. 132) that:

> '. . . the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway.[1] In these circumstances the Court is unable to accept the view that the *Indreleia for the purposes of the present case*, has a status different from that of the other waters included in the "skjaergaard" ' —(italics added).

It may be that by the phrase italicized the Court meant to indicate that although for the purposes of the *Fisheries* case—where the issue was the *status* of certain waters—the *Indreleia* must be regarded as having the general status of internal waters, yet if the issue were different—if, for instance, it were specifically a question of passage rights through the *Indreleia*—then this waterway might not be held to be fully internal for that purpose, and might be held to be subject to such rights. It is impossible to say. But as Professor Waldock points out,[2] failing this, there is a potential clash with—or at any rate nullification of—the decision of the Court in the *Corfu* case, recognizing the right of innocent passage for warships as well as merchant ships through straits used for navigation between two parts of the open sea. This opposition must exist if, in *practice*, such straits or channels can, by the application of the doctrines of the *Fisheries* case, be converted from territorial into internal waters. This is a danger that can only be avoided by a recognition of the fact that the doctrine of innocent passage ought (e.g. on the basis of a recognition of acquired rights) to apply to all waters normally used by international shipping, and not actually behind the true mainland coast[1] of the State concerned, even if they have juridically the status of internal or national waters.

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[1] As Professor Waldock points out (loc. cit., p. 158, n. 3) navigational aids are supplied by coastal States in many well-known and important channels, the waters of which are not internal waters. This cannot therefore be any test *per se*. But what the Court doubtless meant was that the *Indreleia* was more akin to an inland river or canal.

[2] Ibid.

(6) *Some indirect consequences of the Court's findings on delimitation*

The foregoing sections have attempted to state the direct legal consequences of the principles of delimitation adopted by the Court, so far as the nature of these permits of reasonably objective evaluation.[2] The decision has, however, certain indirect results that may be overlooked, though some of them have been touched upon above.

(i) *Superior position of the State with an indented coast-line as compared with States having straight or flat coasts*. The *Fisheries* decision is frequently hailed as one that has righted the supposed inequality between the small coastal State with local interests[3] and the large maritime State with overseas interests. Whether this is an apt description must be a matter of opinion; but what is less generally realized is that in the course of righting one inequality—if such was the case—another was created, at the expense this time of the State whose coast-line does not justify, or does not make possible, the adoption of a water-crossing base-line system. So much feeling was generated in the *Fisheries* case about the supposed difficulties and disadvantage under which States with highly indented coast lines were placed (as compared with States having normal coasts) in the matter of delimiting the territorial sea,[4] that comparatively little attention was paid to the enormous advantages that must accrue to the former category of States, *once the straight base-line system was admitted*, not merely in regard to the process of delimitation as such, but in regard to the extent of the waters passing under the dominion of the coastal State, whether as territorial or as internal waters. The United Kingdom did not of course fail to point out that although the question might be framed as one of simplifying the process of delimitation on indented coasts, the underlying issue was that of *a claim to waters*—for a straight base-line both enclosed waters as internal which would otherwise be territorial (or even, in extreme cases, partly high seas), and also produced an extension seaward of the territorial belt in the region opposite the base-line, thus causing waters which would otherwise have remained high seas to become territorial. *In short, a straight base-line system was, and is, simply a disguised method of claiming additional waters, or of altering in favour of the coastal State the status of various stretches of water off its coasts.* Its true purpose is not, and never has been, any other than that, for it is clear that were it not for the positive advantages in the matter of exclusive fishery rights, and in certain other ways, to be derived from the possession of extended territorial waters, or in some cases from the creation of new internal waters, no State would bother to institute a straight base-line system. Such a system not only entails absolutely no practical advantages for the coastal State, apart from the additional waters to be derived from it (and even involves a number of practical disadvantages),[1] but it also necessitates a laborious and difficult task of delimitation, by the selection, determination and publication of the base points, and the production of the appropriately marked charts.[2] However, the advantages in the way of extended waters, territorial or internal, may be very considerable.[3] But these derive from, and depend on, the drawing of water-crossing base-lines, and such lines can only be drawn where there is a bay, curvature or indentation to be crossed. Moreover, according to the view of the effect of the Court's decision in the *Fisheries* case propounded above, base-lines can (apart from the case of bays and minor curvatures) only be employed as part of a *system*, on a coast or portion of coast which, as a whole, justifies the use of such a system. Therefore, quite apart from the fact that on straight or very gently curved coasts, base-lines *cannot* physically be drawn, or are not in practice worth drawing, the legal use of the system is confined to the case of coasts endowed by nature with the necessary degree of general indentation or island enfringement. Where, however, these conditions exist, the effect is to justify a claim to far more extended waters off the coast concerned than could, *on the basis of a similar breadth for the territorial belt*, be claimed by a State exactly similarly situated in all other respects (e.g. as regards the dependence of local communities on inshore fishing),[1] but not possessing the same type of coast-line.

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[1] I.e. minus any coastal island fringe.

[2] The author wishes to stress that, as was made clear in the first article of the first cycle of this series (see this *Year Book*, 27 (1950), pp. 1–41), his aim is exposition and evaluation, not criticism as such. However, the nature of much of the reasoning in the *Fisheries* case, and of the criteria propounded, make both exposition and evaluation difficult without a measure of critical analysis. The decision in the *Fisheries* case has been fully accepted in the United Kingdom. But there is hesitation in accepting some of the reasoning, because of its wider implications, and because of the difficulty of reconciling it with much of what was thought to be the existing law—a point brought out with great force in the dissenting Opinions. As has been observed elsewhere, everything in this case depended (and in more senses than one) on the 'point of departure'. Given the initial premises, then the Court's findings of principle were, as Johnson says (loc. cit., p. 161), 'simple and not unreasonable in themselves', though their practical application can hardly fail to be difficult or uncertain in many concrete cases.

[3] Though really, *all* maritime States have these, while Norway also had wider ones as a major ship-owning country.

[4] As has already been seen, however, the supposed complications are non-existent, as witness the delimitation on normal lines from low-water mark along the coast in such regions as western Scotland, western Canada, Alaska, Labrador, &c. This fact is sufficient in itself to demonstrate the true purpose of the base-line system.

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[1] Both from the standpoint of the local coastguard or patrolling authorities and from that of mariners, it is harder to tell whether a vessel is inside or outside territorial (or internal) waters where a base-line system exists, than where territorial waters are drawn from the coast and all internal waters (apart from those of moderate bays) are behind the line of the coast (see above, p. 395, n. 3, and p. 388, n. 2).

[2] A base-line system absolutely necessitates a special delimitation, its publication, and the possession by mariners of charts showing the base-lines and resultant territorial waters. Otherwise mariners cannot tell when they are within those waters. On the coast-line system all the mariner need know is the mileage claimed by the coastal State for the breadth of its territorial belt, and any closing lines of bays. He can then without any specially marked chart ascertain by the arcs of circles method whether he is or is not within the specified mileage from the nearest point on shore (see ibid.).

[3] How great, may be seen from the case of Iceland, whose base-lines system has resulted in the addition of over 5,000 square miles of waters. In the case of one or two of the larger bays, the outer limit of territorial waters, which formerly ran three or four miles from the bottom of the bay, is now situated across the entrance along a line some fifty miles from the far end of the bay; and all these additional waters are of course *internal*.

(ii) *Some consequences in regard to internal waters.* Attention has already been drawn to the fact that the base-line system results in the creation of a new category of internal or national waters which, not being the waters of a bay proper, are nevertheless situated in front of and not behind the line of the coast.[2] This has two principal consequences:

(*a*) Formerly (and this is still the case where no base-line system is employed) the coast was washed by the territorial sea alone.[3] Now, with a sufficiently intensive base-line system, and except at the actual terminal points where the base-lines touch land, it could be washed by a semi-continuous belt of internal or national waters, fringing the entire coast, the territorial belt being outside and to seaward of this inner belt. This great advantage is, however, equally reserved to States the nature of whose coasts permits and justifies the use of a general base-line system.

(*b*) *Passage.* It is not necessary to do more than draw attention to the fact, already discussed,[4] that the use of a base-line system enables passage rights to be denied through extensive stretches of water, habitually used for international navigation, and necessary for that purpose, which were formerly territorial (or even in extreme cases partly high seas), and which, being in front of and not behind the coast, and not enclosed as a true bay, retain *physically and geographically* the character of territorial waters, while being made to undergo a purely juridical change of status.[5]

(iii) *The element of uncertainty.* Apart from the specific uncertainties to which attention has already been drawn, the judgment of the Court in the *Fisheries* case has created a standing element of uncertainty in two main categories of cases:

(*a*) *In relation to the territorial belt.* Where the territorial belt is drawn from the coast-line, its delimitation is, *in general*, a matter of complete certainty—that is to say, the base-line itself is certain and not open to challenge.[1] Where water-crossing base-lines are used, the subjective character of the tests afforded by the Court, both for determining whether a base-line system is justified at all, and for determining the validity of the individual base-lines, means that the coastal State can never be certain that its delimitation is not open to challenge; while equally other States can never be certain whether they have good grounds for challenge. Only by bringing the matter to the test of an adjudication can actual certainty be achieved. Alternatively, the coastal State would have to agree its base-lines in advance with the States likely to be principally interested.[2] Failing agreement, however, adjudication can in many cases not be compelled, owing to the absence of universal compulsory jurisdiction. This means the possibility of keeping open a sore or standing matter of controversy between many States, such as was previously confined principally to issues affecting the breadth of the territorial belt, but which seldom arose regarding the line of departure of that belt.[3] The position is one, therefore, in which, in practice, the coastal State can in many cases establish what base-lines it pleases, with relative impunity, unless States challenging the validity of the resulting delimitation are ready to afford armed escort to their vessels using the disputed waters.

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[1] It has already been pointed out that this is in fact a characteristic of almost all maritime States and not the peculiarity of a few.

[2] Even in the case of a bay—provided it is a moderate one (as on the application of the ten-mile rule it would be)—the closing line can be regarded as following the general *line* and not merely the general direction of the coast, and the enclosed waters as being therefore within the body of the land and as having genuinely the character of internal waters (see, e.g., pp. 407–8 above).

[3] Except, of course, inside certain bays—as to this, see the previous footnote—and at high tide, if the territorial belt is drawn from low-water mark.

[4] See pp. 418–20 above.

[5] It is to be hoped that a way will be found of enabling some degree of passage rights to be retained, at any rate in certain waters, e.g. as a recognition of acquired rights. The present possibilities are inimical to the principle of the freedom of navigation, and to the interests of free communication between countries, and cannot be justified by reference to any practical necessity or rational consideration.

(*b*) *In relation to bays.* Here the situation resulting from the Court's pronouncements[4] is one of considerable uncertainty. Since closing lines to at any rate a considerable number of bays could properly be drawn, even on the basis of the coast-line rule, the decision of the Court about straight base-lines does not directly affect the question of actual bays, nor does the 'general direction of the coast' rule, since up to a very liberal point the closing line of a bay proper necessarily follows the general direction of the coast as it runs at the entrance to the bay.[5] The bay problem therefore remains fundamentally what it always has been, one of the *length* of the closing line, pure and simple. There is also the question of what, geographically, constitutes a bay proper. This question is no longer of primary importance where the coast justifies the use of base-lines generally, since in that case base-lines can be drawn across curvatures and openings that are not bays. But it remains of primary importance for coasts that do not enable a general base-line system to be adopted, since here closing lines can, in general, only be drawn across indentations that are true bays. It would have been helpful to have had a juridical definition of a bay therefore,[1] but this the Court did not give. On the other hand, it cast doubt on the main element of stability in the existing law of bays, the ten- or twelve-mile limit on the length of the closing line (apart of course from the case of historic bays)—without suggesting any other limit (but also without suggesting that there was no limit at all). In consequence, the rights of States in the matter of drawing closing lines to bays, and of other States in objecting to the drawing of any given closing line—which formerly were matters of relative certainty—are now somewhat of an open question.

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[1] For the purposes of this general statement of the position, possible controversies about the closing lines of bays can be ignored.

[2] It is a matter for satisfaction that the Danish Government were willing to enter into certain discussions before the very moderate base-lines drawn in respect of Greenland were finalized, and that an Agreement with the United Kingdom about the fishery limits off the Faroe Islands obviated the necessity for establishing a base-line system *as such*.

[3] Now, of course, this may afford additional ground of controversy between States that previously only disagreed on the question of the breadth of the territorial sea, or new ground of controversy between States which, adopting the same breadth, did not previously differ at all.

[4] For reasons already given, they do not, on this question, amount to more than that, being *obiter dicta* not deciding any concrete issue in the case.

[5] See p. 414 above.

(iv) *Practical disadvantages to navigation.* It has already been pointed out that the base-line system is far more troublesome than the coast-line system, both to the coastal State and to all other interested parties. The troubles of the coastal State are, however, its own concern (since no State is ever obliged to institute a base-line system), and are presumably outweighed by the advantages to be gained in extended waters. The difficulties for shipping resulting from this system, are, however, another matter, and a cause of common concern. The concept of a belt of territorial sea of uniform breadth off a coast was a simple one, and easy for the mariner to deal with provided he knew the breadth claimed and had a chart of the *coast-line*.[2] The water-crossing base-line system introduces an element of artificiality and complication that never previously existed, as Judge McNair pointed out in regard to the Norwegian system (*I.C.J.*, 1951, at pp. 168–9):

> 'The result of the lines drawn by the Decree is to produce a collection of areas of water, of different shapes and sizes and different lengths and widths, which are far from forming a belt or *bande* of territorial waters as commonly understood. I find it difficult to reconcile such a pattern of territorial waters with the almost universal practice of defining territorial waters in terms of miles—be they three or four or some other number. Why speak of three or four miles if a State is at liberty to draw lines which produce a maritime belt that is three or four miles wide at the base-points and hardly anywhere else?[3] Why speak of measuring territorial waters from low-water mark when that occurs at 48 base-points and hardly anywhere else? It is said that this

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[1] See, however, p. 414, n. 1, above, for a tentative definition.

[2] No tracing of the *outer* limit of territorial waters is necessary where the coast is the base-line (see p. 387, n. 1, and p. 388, n. 2, above), and charts do not normally have any such tracing marked on them.

[3] The base-*points* are necessarily on shore, but a spot in the middle of a line drawn between two such points may be many miles from the shore, so that the combined breadth of the internal waters behind the line and the territorial waters in front of it may greatly exceed the normal breadth of the territorial sea. This excess varies from base-line to base-line according to the depth of the indentation enclosed.

pattern is the inevitable result of the configuration of the Norwegian coast, but I shall show later that this is not so.'[1]

Elsewhere, Judge McNair drew attention to the practical considerations involved (ibid., at p. 161):

> 'One must not lose sight of the practical operation of the limit of territorial waters. It is true that they exist for the benefit of the coastal State and not for that of the foreign mariner approaching them. Nevertheless, if he is to respect them, it is important that their limit should be drawn in such a way that, once he knows how many miles the coastal State claims, he should—whether he is a fisherman or the commander of a belligerent vessel in time of war[2]—be able to keep out of them by following ordinary maritime practice in taking cross-bearings from points on the coast, whenever it is visible, or in some other way. This practical aspect of the matter is confirmed by the practice of Prize Courts in seeking to ascertain whether a prize has been captured in neutral territorial waters or on the high seas. . . .'[3]

In actual fact the base-line system not only makes it essential for the mariner to be equipped with charts on which all the base-lines are accurately drawn, and (preferably though not essentially) the outer limit[4] of the territorial sea, but it is also calculated to deprive him to a considerable degree of what must always—despite modern scientific devices—remain one of the chief aids to coastal navigation, namely, sight of land. The importance of this is seldom realized by landsmen. The tendency of a base-line system—even where only three or four miles are claimed for the actual breadth of the belt—is in many places to push the outer limit quite out of sight of land. For instance, in some areas round Iceland a ship may be within what are claimed as territorial waters on the basis of a four-mile limit, and yet, by the operation of a base-line, be nearly thirty miles from the nearest point on land. Where greater mileages than three or four are claimed for the breadth of the territorial sea, the chances of not being able to sight land are proportionately greater. The result is (to take the common case of the fishing vessel) that in order to be sure of not trespassing, the vessel must keep even farther afield than is actually necessary, thereby diminishing the area of fishing ground open to her, and correspondingly enlarging that in which the vessels of the coastal State can enjoy a virtual monopoly. It can safely be assumed that the possibility of enjoying this 'unearned increment' does not escape the attention of the champions of the base-line system.

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[1] As to this, Judge McNair said later (p. 169):

> 'Norway has no monopoly of indentations or even of skerries. A glance at an atlas will show that, although Norway has a very long and heavily indented coast-line, there are many countries in the world possessing areas of heavily indented coast-line. . . . The coast of Canada is heavily indented in almost every part. Nearly the whole of the west coast of Scotland and much of the west coast of Northern Ireland is heavily indented and bears much resemblance to the Norwegian coast.'

Continuing (p. 170), Judge McNair said:

> '. . . the north-west coast of Scotland is not only heavily indented but it possesses, in addition, a modest "island fringe", the Outer Hebrides. . . . At present the British line of territorial waters round this island fringe, inside and outside it, *follows the line of the coast without difficulty and does not, except for the closing lines of lochs not exceeding ten miles, involve straight base-lines*. . . . This is also true of the heavily indented and mountainous mainland of the north-west coast of Scotland lying inside of and opposite to the Outer Hebrides'—(italics added).

[2] The importance of the delimitation of territorial and inland waters in connexion with belligerent and neutral rights and duties is often overlooked.

[3] See preceding footnote.

[4] This, as already indicated, is never necessary where there are no base-lines, and is not usually done.

Summary of Conclusions on Delimitation

A brief summary of the main features of the legal position on delimitation, as it appears to result from the Court's findings about the straight base-line question, may be useful.[1]

(*a*) *Straight base-lines generally*

(i) The Court, while ruling that the line of the tide-mark along the coast was not necessarily the only base from which the territorial sea could properly be measured, did not sanction the indiscriminate or habitual use of straight, water-crossing base-lines, and its decision does not justify the view that any State may now draw a straight base-line anywhere. The true effect of the decision is that *except in those cases where a straight base-line could, in principle, have been drawn even under the ordinary system of the line of the coast as the base*, such a base-line can only be drawn as part of a general *system* of base-lines, in circumstances justifying the establishment of such a system.

(ii) The circumstances justifying the establishment of a general water-crossing base-line system (apart from a historic case[2]) are geographical and physical—a rugged and heavily indented coast-line, such that the coast could be represented as a 'pecked' line, and the base-lines as constituting the peckings.

(iii) Economic factors—such as the dependence of local communities on inshore fishing—are not, *per se*, a justification for the establishment of a general base-line system. They may, however, be (*a*) a contributory factor; (*b*) relevant as evidence of a historic usage; (*c*) a circumstance justifying the way in which a particular base-line is drawn in a particular region where there are local interests peculiar to that region.

(iv) In those cases (which remain the normal, usual, and most frequent cases) where the use of a general base-line system cannot be justified, territorial waters must, in principle, be measured from low-water mark continuously along the line of the coast. Straight base-lines can then only be drawn, if at all, in two categories of case:

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[1] These conclusions are necessarily tentative. There is room for genuine differences of opinion as to the effect of the Court's decision on many points. Professor Waldock's article (op. cit.), while not absolutely explicit on all of them (e.g. (*a*) (i), possibly (*b*) (ii), and (*c*) (iii)), is believed to agree with each of these conclusions except (*b*) (iii).

[2] It must, however, be borne in mind that a historic case is not merely ancient usage, but usage *acquiesced in*—even if only tacitly—by other States. As to the role of the time factor, see this *Year Book*, 30 (1953), pp. 30–31.

1. as closing lines to certain bays (see under (*b*) (ii) below)—a bay being defined roughly as an opening of a depth not less than half the width of its entrance;
2. in the case (possibly) of minor curvatures, where it is simply a question of simplification.

(v) In those cases where a general straight base-line system is justified, the individual base-lines, while not specifically subject to any definite limit of length, must conform to the following requirements:

1. they must be drawn between terminal points both of which are on land (this may be the mainland coast, or an island, or even a rock—provided it is not merely a drying rock); but in no circumstances can there be a terminal point in the sea;[1]
2. they must follow, or not appreciably depart from, the general direction of the coast;
3. they must be such as only to enclose waters sufficiently linked with the land to have the true character of internal waters;
4. they must be drawn *inter fauces terrarum*;[2]
5. they must be moderate and reasonable, and drawn in a reasonable manner.

(*b*) *Bays*

(i) Closing lines to bays—provided they are true bays (as to which see (*a*) (iv) 1. above)—constitute an exception to the 'system' principle stated in (*a*) (i) above. Nevertheless,

(ii) while not necessarily[3] subject to a limit of ten miles in length, such closing lines are subject in principle to some limit of length, and must in any case conform to the criteria for all base-lines given in (*a*) (v) above.

(iii) The principle of the historic bay remains, although its field of application is probably a good deal reduced.

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[1] This aspect of the matter was not, however, explicitly dealt with in the *Fisheries* case, since all the Norwegian base-lines were in fact drawn between terminal points on land or from rocks that were not drying rocks. However, the inference is not only a reasonable one, it is practically a necessity, and represents the view adopted by the International Law Commission's Committee of Experts (see above, p. 393, n. 5).

[2] More correctly, the enclosed *waters* should lie *inter fauces*.

[3] This term is used because the Court's pronouncement rejecting the ten-mile limit was *obiter* and not directly operative.

(*c*) *Islands*

(i) Islands have, in principle, their own belt of territorial sea, provided they are permanently above high-water mark.

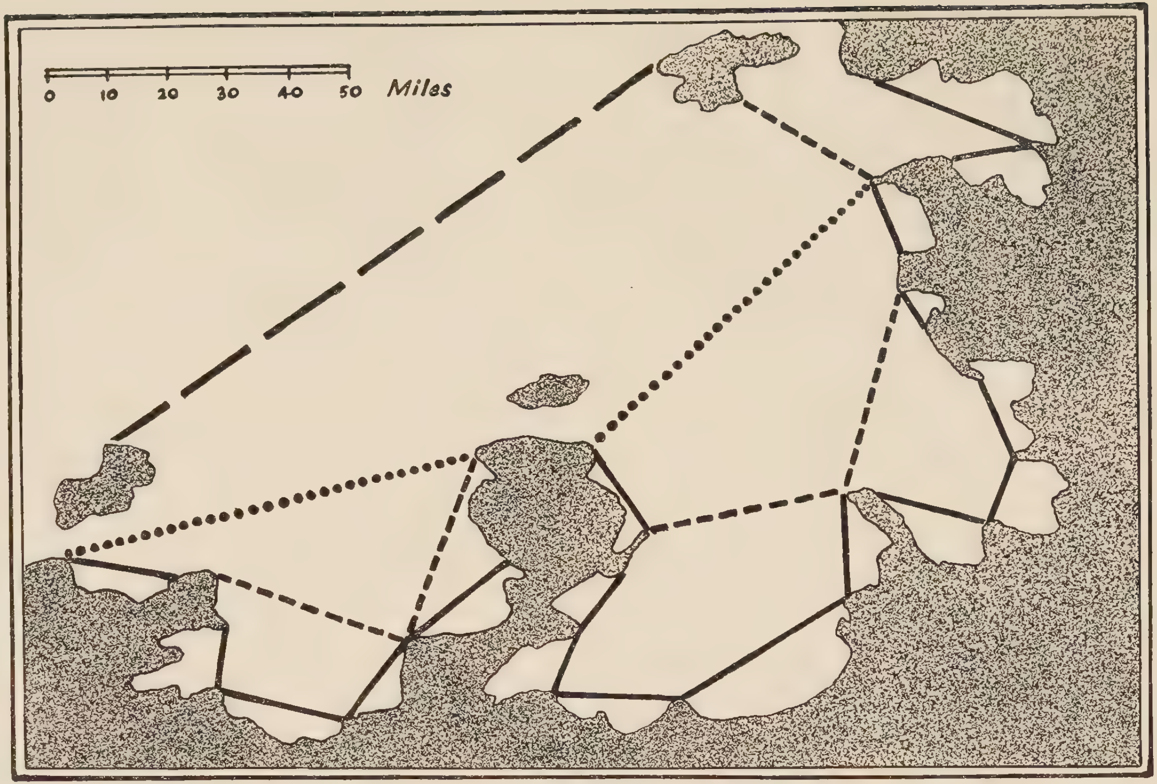
(ii) Islands constituting a continuous *fringe* to a coast, or part of it, can, if sufficiently closely related to the mainland, be treated as one with it. The islands can then be joined by base-lines as if they were indentations of the coast, provided the base-lines conform to the criteria in (*a*) (v) above.

(iii) The position of islands in a group is not directly affected by the Court's decision, and it remains an open question in what circumstances a group can be treated as a unit, with an 'over-all' territorial belt from base-lines joining up the islands of the group.

(*d*) *Passage rights*

(i) Where base-lines are drawn, the waters enclosed behind the base-lines, or lying between an island fringe and the mainland (where the fringe is treated as part of the mainland), become internal or national waters, and in principle are no longer subject to the right of innocent passage.

(ii) Nevertheless, the decision of the Court left open the possibility that in certain cases such a right might be held to persist.


0
10
20
30
40
50
Miles

The plain, small peck, dotted, and large-peck lines represent different conceptions of following the ‘general direction of the coast’

NOTES

THE NOTION OF POLITICAL OFFENCES AND THE LAW OF EXTRADITION[1]

IN September 1954, seven members of the crew of a Polish trawler, fishing in the North Sea as part of the Polish fishing fleet, put the master and some members of the crew under restraint; one member of the crew who was acting as political secretary was overpowered and was slightly wounded in the hand. On arrival at Whitby, the seven seamen went ashore and asked for political asylum. The Polish Government, under a Treaty of Extradition of 11 January 1932[2] between Poland and the United Kingdom, requested the extradition of each of the seven men for the following offences: use of force, depriving his superiors and other members of the crew of their freedom; wounding one member of the crew; damaging the trawler's wireless installation; and preventing the captain of the trawler from directing her. The majority of the offences constituted offences listed in Article 3 of the Extradition Treaty between Poland and the United Kingdom and in Schedule I to the Extradition Act, 1870.

At the hearing before the chief metropolitan magistrate at Bow Street on 3, 10, and 23 November 1954, the prisoners whose extradition was requested claimed that their offences were of a political character. Evidence was called to show that there was on board the trawler a political commissar[3] and a party secretary (nominally an engineer) who were really in charge of the crew, the captain being in charge of navigation only. The political commissar and the party secretary exercised political supervision over the crew and listened in to and recorded their private conversations. Evidence was also called as to conditions generally in Poland under the Communist régime showing, in particular, that any attempt to leave Poland without permission and to go to one of the Western democracies was punished as an offence of a treasonable nature.

The chief metropolitan magistrate on the evidence before him, found that there was a prima facie case that all the prisoners were guilty of revolt on the high seas and that Kolczynski was guilty of unlawful wounding; that all the acts done by the prisoners were done solely with the object of leaving their country in which they suffered an intolerable sense of frustration and repression; and that an attempt by a Pole to leave his country was now regarded in Poland as treason. The magistrate left the question of law whether, in those circumstances, the prisoners were entitled to the protection of Section 3 (1) of the Extradition Act, 1870,[4] to the High Court on an application for a writ of habeas corpus, and committed the seven seamen to prison to await a further order.

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[1] This Note is a comment on the case of *Regina* v. *Governor of Brixton Prison, Ex parte Kolczynski and Others*, [1955] 2 W.L.R. 118; [1955] 1 All E.R. 31.

[2] Treaty Series No. 10 (1934), Cmd. 4557. Article 3 of the Treaty reads as follows: 'Extradition shall be reciprocally granted for the following crimes or offences when they are punishable in accordance with the laws of both the High Contracting Parties. . . . 7. Kidnapping or false imprisonment. . . . 12. Maliciously wounding or inflicting grievous bodily harm. . . . 25. Piracy. 26. Wrongfully sinking or destroying a vessel at sea or attempting to do so. 27. Assault on a person on board a ship on the high seas with intent to inflict death or do grievous bodily harm. 28. Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas, against the authority of the master. . . .'

[3] The political commissar was not actually present on board the trawler at the time the alleged offences were committed, as he was then visiting another trawler in the same fishing fleet.

[4] The relevant provisions are as follows:

§ 3. 'The following restrictions shall be observed with respect to the surrender of fugitive

On 25 November 1954 counsel on behalf of the seamen applied *ex parte* for writs of habeas corpus. On the hearing of the applications, the High Court directed the writs to issue in the case of each of the applications, and thus decided, in effect, that the prisoners should not be surrendered to the requesting Power. On 13 December 1954 the Court gave their reserved judgment on the motion, which, summarized very shortly, was to the effect that by virtue of Section 3 (1) of the Extradition Act, 1870, the applicants were not subject to surrender to the Polish State, in that they had proved to the satisfaction of the Court that the requisition had in fact been made with a view to trying or punishing them for offences of a political nature.

The Court, in delivering their reserved judgment, did not lay down any definition of a political offence, but they made it clear that the older definition given in *Re Castioni*[1] was too narrow in the circumstances of the present day. The facts in *Castioni*'s case were that, in the course of a revolt against the Government of a Swiss Canton, the prisoner, who had played an active part in the disturbances, shot with a revolver at and killed a member of the Government. The prisoner's extradition was requested on a charge of murder. On an application for habeas corpus the Court held that the offence which the prisoner had committed was incidental to and formed part of political disturbances, and was therefore an offence of a political character within the meaning of Section 3 (1) of the Extradition Act, 1870.

Up to the time of *Castioni*'s case there had been no decision in the English courts as to the meaning of the words 'offence of a political character' in the Extradition Act, 1870. The Court, while emphasizing (*per* Denman J. at p. 155) that they did not consider it necessary or desirable to put into language 'in the shape of an exhaustive definition exactly the whole state of things, or every state of things, which might bring a particular case within the description of an offence of a political character', approved the definition of political offences given by Sir James Stephen when he said: 'Fugitive criminals are not to be surrendered for extradition crimes if these crimes were incidental to and formed a part of political disturbances.'[2] They rejected John Stuart Mill's definition of a political offence as 'Any offence committed in the course of, or furthering of civil war, insurrection or political commotion', on the grounds that if it 'were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object and intention of it, and other circumstances connected with it', it would be 'a wrong definition and one which could not be legally applied to the words used in an Act of Parliament'.[3] Denman J. continued (at p. 156): '. . . To bring the case within the words of the Act . . . it must at least be

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criminals:

> (i) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habaes corpus or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.'

[1] [1891] 1 Q.B. 149.

[2] *History of the Criminal Law*, vol. ii, p. 70.

[3] When the Bill which became the Extradition Act, 1870, was debated in Parliament, the following clause to protect political offenders was proposed:

> 'Nothing in this Act . . . shall be construed to authorise the extradition of any person in whose case there shall be reasonable grounds for believing that his offence . . . had for its motive or purpose the promotion or prevention of any political object; nor to authorise the extradition of any person the requisition for the delivery of whom shall not contain an undertaking on the part of the sovereign or government making such requisition that such person

shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising or a dispute between two parties in the State.'

The conception that the criterion of a political offence is an act committed in the course of a struggle for power between two parties in a State is also to be found in *Re Meunier*,[1] decided three years after *Castioni*'s case. In *Meunier*'s case, the prisoner was committed for extradition on two charges of anarchist offences committed in France—causing explosions at a café and at a certain barracks. On an application for habeas corpus, it was argued on the prisoner's behalf that the explosion at the barracks was a political offence since the 'evidence shows an attempt to destroy Government property, the quarters occupied by the soldiers of the French Government'. Considering this argument, Cave J. said (at p. 419): '. . . In order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other. . . . If the offence is committed by one side or the other in pursuance of that object it is a political offence; otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other: for the party with which the accused is identified by the evidence and by his own voluntary statement, namely, the party of anarchy, is the enemy of all Governments.' For those reasons the Court held that the offence which it had been argued on behalf of the accused was of a political nature was not a political offence within the meaning of Section 3 (1) of the Extradition Act, 1870, and the application for a writ of habeas corpus was refused.

It is perhaps surprising to find that after *Meunier*'s case there was, until 1954 little or no attempt by the English courts to examine afresh the conception of 'offences of a political nature'. In view of the dearth of decisions in the English courts bearing on this definition special interest attaches to decisions of the courts of other European countries in which an attempt was made either to find such a definition or to decide, in the light of general principles, whether or not an offence was of a political character. The examples given below show that the Swiss courts, in particular, were less rigid in the criteria they applied than the courts of nineteenth-century England, though it appears that they would have agreed with the English courts in considering J. S. Mill's definition to be too wide. For instance, when, in 1928, the French Government requested the extradition from Switzerland of an anti-fascist journalist who shot and killed an Italian fascist in Paris,[2] the Swiss Federal Court held that the crime was not a political one and cited precedents to establish that a crime 'is invested with a predominantly political character only where the criminal act is immediately connected with its political object—where the act is in itself an effective means of obtaining this object, or where at least it forms an integral part of acts leading to the ends desired'. The prisoner's act being 'a single act of political terrorism, performed in a foreign country, and directed only towards an immediate result', it was not a crime of a political nature.

Another case decided in the Swiss courts in 1933[3] lays stress on the motives and objects of the offence for the purpose of deciding whether or not it is of a political

> shall not be proceeded against, or punished on account of, any offence which he shall have committed before he shall be delivered up other than the offence specified in the requisition'.

This form of wording was rejected. In a Note on Political Offences in the Appendix to the fourth edition of *Clarke on Extradition*, which contains the text of the above clause, the killing of a man in civil war and the seizure of property by the leader of an armed rebellion are given as examples of 'true political crimes' (Clarke, *Extradition* (4th ed., 1903) pp. d–diii).

[1] [1894] 2 Q.B. 415.

[2] *Annual Digest*, 1927–1928, Case No. 239 (*Pavan Case*).

[3] *Annual Digest*, 1933–1934, Case No. 157 (*In re Ockert*).

nature. In that year the extradition, at the request of the Prussian Ministry of Justice, of a German national for homicide was refused. The prisoner was a member of the German Social Democratic Party who had shot and killed a certain Josef Blesser in the course of an affray in the streets of Frankfurt with members of the National-Socialist Party. The Court held that the case was 'one essentially of political conflict' and defined political offences as 'acts which have the character of an ordinary crime appearing in the list of extraditable offences but which because of the attendant circumstances, in particular because of the motive and the object, are of a predominantly political complexion'.

The principle that isolated acts of a terrorist nature which do not form part of political disturbances are not to be considered as offences of a political nature, which was affirmed in the English courts in *Meunier*'s case, was recognized in a decision of the Swiss courts in 1930.[1] The Court granted the extradition of a German national for bomb outrages in Prussia which were said to have been committed to further the ends of the 'Country People's Movement' the primary aim of which was to change the law of taxation. The Court emphasized that it was not the practice of the Swiss courts 'to attribute the character of a political offence to purely terrorist acts which were not mere episodes in the course of an action aiming at the overthrow of the State', and added that 'The danger to innocent persons brought about by the bomb outrages caused the common elements of the delicts mentioned in the warrant of arrest to become predominant so as to prevail completely over the political aspects of the act.'

The conception of political offences as those occurring in the course of a struggle for power between two parties in the State appears to underlie a decision of the Swiss Federal Court in 1928 when extradition was requested on a charge of the forgery of a bill of lading.[2] The prisoner claimed that he had not forged the document from any pecuniary motives, but from political motives—to damage the working of the Dawes Plan. It was held that the accused should be extradited 'since in order to recognize the political character of a crime of this description, it is necessary that the act in question should have been directed against the political régime of the State either in an effort to secure power in the State, or as an isolated incident in such a struggle'.

Of interest in illustrating the view that the mere connexion of a crime with a political object is insufficient to endow it with a political character, is a case in which Germany sought the extradition from Guatemala of a German national[3] for an act of murder which the fugitive claimed was a political crime. The fugitive belonged to a patriotic society secretly organized to operate in defence of his country. The Supreme Court of Guatemala, in deciding that extradition should be granted, held that the fact that the accused's membership of 'a patriotic society secretly organised to co-operate in the defence of his country, cannot in any way give the character of political crimes to those committed by its members. . . . Universal law qualifies as political crimes sedition, rebellion and other offences which tend to change the form of Government or the persons who compose it; but it cannot be admitted that ordering a man [to be] killed with treachery, unexpectedly and in an uninhabited place, without form of trial or authority to do it, constitutes a political crime.'

If the *ratio decidendi* in *Re Kolczynski and Others* is examined, it is clear that the Court, whilst not prepared to lay down a new definition of offences of a political nature, was prepared to go a long way beyond the criteria which the English courts had adopted in the nineteenth century in *Castioni*'s case and *Meunier*'s case, namely the conception that for offences to be of a political nature they must have been incidental to and formed part of political disturbances in which one party in the State was trying to overthrow another. In *Kolczynski*'s case there emerges the recognition of changed circumstances to which the old criteria cannot apply. Cassels J. said (at p. 35): 'The words "offences of a political character" must always be considered according to the circumstances existing at the time when they have to be considered.' Goddard C.J. said (at p. 36): 'It is necessary . . . to give a wider and more generous meaning to the words [i.e. offences of a political character] which we are now considering, which we can do without in any way encouraging the idea that ordinary crimes which have no political character will be thereby excused.' From *Kolczynski*'s case, there has emerged an adaptation of the conception of an offence of a political nature to the circumstances of a world in which there exist States where all opposition is so ruthlessly suppressed that there can be no question of two parties in the State in open competition with each other. To say that a person whose extradition is demanded by a totalitarian State will never, if surrendered, be tried or punished for an offence of a political nature is clearly wrong. What then are the new criteria which must be adopted to serve the needs of the present age?

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[1] *Annual Digest*, 1929–1930, Case No. 188. (*In re Kaphengst*).

[2] *Annual Digest*, 1927–1928, Case No. 240 (*Noblot Case*).

[3] *Annual Digest*, 1929–1930, Case No. 189 (*In re Eckermann.*)

Cassels J. in holding that it was shown on the evidence that the seven seamen, if extradited, would be punished as for an offence of a political character, obviously gave considerable weight to that part of the evidence which showed that for a Pole to leave Poland and to go to a Western country without permission was, in Poland, regarded as tantamount to treason. He referred (at p. 120) to Article 79 (2) of the Constitution of the Polish People's Republic under which 'treason of the country' is defined as 'spying, weakening of the armed forces, going over to the enemy' and 'will be punished with all the severity of the law'. As well as adverting to the evidence given to the effect that to go to a Western country from Poland without permission would be treason, Cassels J. referred to letters from relatives handed to the seven seamen whilst in this country in one of which it was stated 'You are a traitor to the country and a traitor you will remain to your death. You have abandoned and betrayed your country. You have escaped to our enemies.' Distinguishing the present case from *Castioni*'s case, Cassels J. said (at p. 121): 'It was not then [in 1891] treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress. Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave.' Summarizing the facts of the present case, Cassels J. added: 'The applicants revolted by the only means open to them . . . if they were surrendered there could be no doubt that while they would be tried for the particular offence mentioned, they would be punished as for a political crime.'[1] For that reason he had considered that the writ of habeas corpus should issue.

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[1] The argument appears to rest on the basis that while the persons concerned would be tried for the particular offences mentioned, they would be punished *as for the offence of treason.* Treason is not itself an extraditable crime, but it appears to be uncertain whether it is excluded from the category of extraditable crimes because it is assumed to have a political character. Considered as an offence against *the State* (as opposed to an offence against a particular party or régime), there would seem to be no reason why treason should be regarded as being a specifically political crime, any more than other kinds of offences that are offences against the State, e.g. offences against its currency law. The difficulty in the case of a totalitarian State is that the régime is identified with the State, and consequently an offence against the régime is deemed to be an offence against the State and therefore treasonable; as the basis of the above reasoning it might therefore be argued in totalitarian quarters that an offence against the régime, being an offence against the State, is not political in character. It would seem, in consequence, that

Goddard C. J., on the other hand, in reaching the conclusion that the offence for which the extradition of the applicants was requested, though on the face of it an extradition crime, had in the present case a political character, appears to have based his judgment primarily on the view that 'the revolt of the crew was to prevent themselves being prosecuted for a political offence and . . . therefore the offence had a political character' (p. 123). In other words, the Lord Chief Justice looked (as did the courts of certain foreign countries in the cases cited earlier in this note) at the direct connexion of the criminal act with a political object. If that connexion exists, the act, though on the face of it an extradition crime, is an offence of a political nature. 'The political character of the offence', he emphasized (at p. 122), 'may emerge either from the evidence in support of the requisition or from the evidence adduced in answer.'

To apply as a test the direct connexion of the offence with a political object does not, of course, entirely remove the difficulty, for it leaves open the question of what constitutes a political object. *Kolczynski's* case appears, however, clearly to establish that an act committed solely because of the fear of prosecution for a political offence or of political persecution will suffice to give the crime a political character if such fear led directly to the commission of the crime for which extradition is demanded. Mere dissatisfaction with life in a totalitarian State would not seem to be sufficient in itself to give an act committed as an expression of such dissatisfaction the character of a political offence. The foregoing considerations furthermore appear to rule out what the English and foreign courts have considered should be excluded, and what J. S. Mill's definition would seem to let in, namely, the possibility of an offence being considered to be of a political nature simply because it is committed in the course of either a political rising or in the course of escaping from political persecution or political tyranny. To take an example, forgery of documents which were essential for the purpose of leaving a country to avoid political persecution would be an offence of a political nature. On the other hand, a murder which was committed in the course of an escape from political persecution but which was actually motivated by a private grudge, would quite clearly not be an offence of a political character. Nor, it seems, would be the murder in the course of such an escape of an individual communist if it were not committed in furtherance of the escape, but simply from hatred of all members of the Communist Party.

Although the main interest of *Re Kolczynski* is the breaking of new ground in the elaboration of the conception of offences of a political nature, there are two other points of subsidiary interest.

The first, which relates to the proper construction to be placed on Section 9 of the Extradition Act, 1870, is the Court's rejection of a dictum by Hawkins J. in *Castioni's* case[1] to the effect that Section 9 required the magistrate merely to take the evidence for the defence, so that it could be considered by either the High Court or the Secretary of State, and that the magistrate could not himself therefore decide as to whether or not the offence for which extradition was requested was of a political nature. In *Kolczynski's* case the chief magistrate, while accepting the evidence, thought that, as the only decision on what constituted a political offence was that in *Castioni's* case, he was bound to commit and to leave it to the High Court to say whether that decision was conclusive or whether the words 'of a political character' could be extended to the

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underlying the decision of the Court in the *Kolczynski* case is a refusal to admit any necessary identity between a totalitarian régime and the personality of the State in which that régime is operative.

[1] [1891] 1 Q.B. 149, at p. 163.

facts he had found to be established. The Court, whilst recognizing that in the circumstances of the case the course the magistrate took was entirely proper, held that the second limb of Section 3 (1) of the Extradition Act, 1870, clearly contemplates a decision by the magistrate on this matter, though a decision to the effect that the crime charged was not of a political nature would, of course, be subject to review on habeas corpus. Lord Goddard said (at p. 125): 'I am of the opinion that it is the duty of the magistrate to determine on the whole of the evidence [i.e. the evidence submitted by the requesting State and any evidence called for the prisoner] whether or not the offence is of a political nature, and also whether it is an extraditable crime. He cannot determine this finally *against* the prisoner [the italics are the writer's] because the latter can question the decision on *habeas corpus*. This does not mean that this Court will review the magistrate's findings of fact, but they will and must consider the result of these findings.'[1]

The second subsidiary point arises from the fact that the Polish Government took no steps to be represented during the extradition proceedings either before the magistrate or the High Court. It is therefore of interest to consider whether they should have arranged for such representation or were justified in claiming that the State against whom the requisition is made should arrange such representation on behalf of the requesting State. The answer appears to be that in the absence of specific treaty provisions (see, for example, the provisions of Article IX of the Extradition Treaty of 26 November 1880, between the United Kingdom and Switzerland)[2] no such obligation rests on the State from which extradition is requested. If the requesting State, in such circumstances, itself takes no steps to be represented either at the proceedings before the magistrate or on an application for habeas corpus, it cannot subsequently complain that the evidence on which either the magistrate or, on habeas corpus, the High Court, finds that the extradition crime is an offence of a political character, is one-sided or incomplete.

J. A. C. G.

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[1] Goddard C. J. pointed out (at p. 124) that the observations of Hawkins J. in *Castioni*'s case were inconsistent with the decisions in *Ex parte Huquet* (1873), 29 L.T. 41; *R.* v. *Maurer* (1883), 10 Q.B. 513; and *In re Arton* (No. 2), [1896] 1 Q.B. 509. In the latter case Russell C. J. said: 'We are not a court of appeal on questions of fact from [the magistrate]. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit.'

[2] *S.P.*, vol. 71, pp. 59–60. The relevant provisions read:

> 'In cases where it may be necessary, the Swiss Government shall be represented at the English Courts by the Law Officers of the Crown, and the English Government in the Swiss Courts by the competent Swiss authorities.'

There are similar provisions in Article XI of the Extradition Treaty of 4 June 1878 between Great Britain and Spain (*S.P.*, vol. 69, p. 11), but no such provisions are to be found in the Extradition Treaty of 11 January 1932 between the United Kingdom and Poland, or in any of the other Extradition Treaties to which the United Kingdom is a party. In *R.* v. *Commissioner of Metropolitan Police, Ex parte Savundranayagan* (reported in *The Times* newspaper 22 March 1955) it was unsuccessfully contended that the requesting State had no power to present the case against the accused in court.

INTERNATIONAL LAW AND THE CONSCRIPTION OF NON-NATIONALS

I

IN *Bicknell* v. *Brosnan*[1] a Divisional Court held that the combined effect of the British Nationality Act, 1948,[2] the Ireland Act, 1949,[3] and the National Service Act, 1948,[4] was to render a citizen of the Republic of Ireland, who was not also a British subject but was ordinarily resident in Great Britain, liable to be called upon to serve in the armed forces of the Crown. In a not dissimilar case it has been held that a citizen of Pakistan, likewise resident in Great Britain, is equally liable to compulsory military service.[5] These decisions are at first sight somewhat surprising. For a hasty reading of the British Nationality Act[6] might produce the impression that the effect of the creation of citizenship of the United Kingdom and Colonies is to reduce the liabilities or duties of persons connected with the Commonwealth or Ireland who do not possess that citizenship to the same scale as those of aliens. This is certainly the case in regard to amenability to extra-territorial criminal jurisdiction. However, save with respect to that jurisdiction, in so far as British subjects are concerned (i.e. citizens of one or other countries of the Commonwealth) the distinction between such as are, and such as are not, possessed of the additional status of citizens of the United Kingdom and Colonies consists only in that the former are not the latter![7] Thus the National Service Act applies to 'every male British subject ordinarily resident in Great Britain'[8] in the same manner as the Representation of the People Act, 1948, applies to all 'British subjects of full age'.[9] And though, in virtue of the Ireland Act, the territory now known as the Republic of Ireland has 'ceased . . . to be part of His Majesty's dominions',[10] it is 'not a foreign country',[11] and its change of status, such as it is, does not[12] affect the provision of the British Nationality Act that 'any law in force in any part of the United Kingdom . . . at the date of commencement of this Act (1 January 1949), whether by virtue of a rule of law or of an Act of Parliament . . . and any law which by virtue of any Act of Parliament passed before that date comes into force on or after that date, shall, until provision to the contrary is made . . ., continue to have effect in relation to citizens of Eire [i.e. the Republic of Ireland] who are not British subjects as it has effect in relation to British subjects'.[13] Indeed, as emerged in *Bicknell*'s case, this complicated formula was adopted just because the British Nationality and National Service Bills were passing through Parliament simultaneously, and 'it would have been difficult and contrary to Parliamentary practice to apply expressly the provisions [of the one Act] while still only a Bill [to the other] which was also a Bill and not law at the time when the former Act was passing through Parliament'.[14]

Bicknell's case thus turned solely upon a point of construction. It is not, however, inconceivable that it raises a question of substantive municipal law. For the view may be taken that the general effect of the British Nationality Act, and especially of its provisions respecting extra-territorial jurisdiction, is to release British subjects and Irish citizens who are not also citizens of the United Kingdom and Colonies from all natural, as distinct from local, allegiance to the Crown in the right of the United Kingdom. And in *Calvin*'s case the resolution of the numerous disputes of the sixteenth century and earlier as to the liability of the subject to serve in the King's foreign wars in the sense that the subject was so liable was directly relied upon to show 'that the ligeance of a natural-born subject was not local, and confined only to England'.[1] If, in effect, all personal jurisdiction over others than citizens of the United Kingdom and Colonies is disclaimed, upon what basis can military service be required of them?

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[1] [1953] 2 Q.B. 77.

[2] 11 & 12 Geo. VI, c. 56.

[3] 12 & 13 Geo. VI, c. 41.

[4] 11 & 12 Geo. VI, c. 64.

[5] *Ullah* v. *Black* (*The Times* newspaper, 23 April 1955).

[6] S. 3 (1).

[7] See this *Year Book*, 30 (1953), p. 244, at p. 277.

[8] S. 1 (1).

[9] 11 & 12 Geo. VI, c. 65, s. 1.

[10] S. 1 (1).

[11] S. 2 (1).

[12] See the Ireland Act, 1949, s. 3 (1).

[13] S. 3 (2).

[14] [1953] 2 Q.B. 77, 82, *per* Lord Goddard C.J.

An ingenious argument of this sort was advanced in the Canadian case of *Re Solvang*.[2] There an alien locally naturalized in Canada claimed to be exempt from compulsory military service overseas on the ground that he was a British subject only within Canada. He contended further that the (Canadian) Naturalization Act whereunder his certificate was granted did not specifically declare him to be a British subject at all, but merely bestowed upon him the rights of a British subject—an argument worth mentioning in view of the wording (quoted above) of the British Nationality Act with regard to the status of Irish citizens. The Supreme Court of Alberta, however, held that the Canadian Act, as the Naturalization Act, 1870, of the United Kingdom,[3] had the effect of making a person naturalized thereunder a British subject not merely within the country of naturalization but also in every country save only, in the case that such a person should not have been divested of his nationality of origin, his country of origin. But the Court distinguished the case of *Rex* v. *Francis*, *Ex parte Markwald*,[4] in which the strictly intra-territorial quality of at least some colonial naturalizations was first squarely determined, on the ground that the Australian statute there involved 'did not contain merely the qualifying clause with respect to a return to the country of origin which has furnished the chief reason for giving the wider interpretation to the British [i.e. United Kingdom] and Canadian Acts'.[5] It thus remains arguable that, although a citizen of a country of the Commonwealth oversea or of the Republic of Ireland who is not also a citizen of the United Kingdom and Colonies is regarded by the law of the latter State as being, or as being in the position of, a British subject whilst within the territory of that State, he is not so regarded elsewhere and may not therefore be compelled to serve the Crown abroad.

II

However, quite apart from municipal legal problems of the kind outlined above in *Bicknell's* case, the latter seems also to raise a question of international law. No doubt the British Nationality Act has, as much between the United Kingdom and what is now the Republic of Ireland as between the former and the countries of the Commonwealth oversea, something of the character of an agreed measure. It may therefore be taken that the Republic of Ireland in a manner consents to or tolerates the imposition of national service upon such of her citizens as are ordinarily resident in Great Britain. What would be the position if that country objected?

The question is clearly related to the larger problem as to whether one State can, compatibly with international law, impose military service compulsorily upon the nationals of another, though, having regard to the foundation of the Act in agreement express or implied and to the rule that Irish citizens are not aliens,[1] it is not identical therewith. Some aspects of the larger problem have attracted considerable attention. In the two World Wars the principal Allied belligerents conscripted nationals of other States upon one basis or another upon a considerable scale—upon such a scale, indeed, that during the First World War the United States alone inducted 200,000 aliens and received 40,000 protests.[2] At least two major States—the United States and France—appear to apply their conscription laws to aliens in time of peace.[3] The matter has been the subject of innumerable diplomatic notes and—as will be shown—of a great many more treaty stipulations than appears generally to be realized. The Hague Conference of 1907, the Havana Conference, and the Hague Codification Conference of 1930, all adverted to the matter.[4] Yet there is little agreement. Hyde asserts that 'in America and England it has been perceived that prolonged residence or domicile begets a duty to render military service for the national defense when the need is dire, and even for a broader purpose when the individual concerned fails to avail himself of reasonable opportunity to abandon his residence and depart from the country'.[5] Borchard wrote as long ago as 1915 that 'whether, in the absence of treaty, domiciled aliens enjoy . . . exemption [from compulsory military service] is somewhat doubtful. . . . As a general rule, nevertheless . . . a demand by the home government of an alien compelled to do military service results in his release from service, on grounds of comity, if not of law.'[6] On the other hand, Oppenheim states categorically that '. . . an alien . . . cannot, unless his own State consents, be made to serve in [the] army or navy [of the local State]'.[7] And in *Polites* v. *The Commonwealth and Another*, in 1945, Latham C.J. of the High Court of Australia declared that regulations purporting to provide for the compulsory service of aliens—in fact Allied nationals—in the Australian armed forces and to place them in this respect in the same position as British subjects 'must be held to be contrary to an established rule of international law'.[8]

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[1] 2 St. Tr. 559, 621.

[2] (1918), 43 D.L.R. 549.

[3] 33 & 34 Vict. c. 102, s. 7.

[4] [1918] 1 K.B. 617.

[5] 43 D.L.R. 549, 555, *per* Stuart J.

The problem and its discussion have been much complicated by extraneous factors. Thus in the first place there is the obvious difficulty which arises with persons of plural nationality. Here it is clear that neither State need yield to the other in the sense of conceding that, because one of its nationals is also a national of the other, he is immune from conscription in the one. Indeed, British courts have not only turned a deaf ear to the plea of a conscript that he was a Swiss national as well as a British subject and had in fact done military service in Switzerland, but have held, despite the clear words of the statute law then in force, that he might not even execute a declaration of alienage in virtue of his Swiss nationality in time of war.[9] Similarly, American courts have so far recognized the amenability of a dual national to the military service laws of his foreign nationality as to hold that his compulsory enlistment thereunder works no forfeiture of his American citizenship, as would voluntary service.[10] As between signatories of the Hague Protocol relating to Military Obligations in Certain Cases of Double

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[1] Ireland Act, 1949, s. 2.

[2] Fitzhugh and Hyde in *American Journal of International Law*, 36 (1942), pp. 369, 372.

[3] Oppenheim, *International Law*, vol. i (8th ed., 1955), p. 681, n. 1.

[4] See Fitzhugh and Hyde, *ubi cit.*, pp. 379–81.

[5] *International Law* (2nd ed., 1945), pp. 1745–6.

[6] *The Diplomatic Protection of Citizens Abroad* (1915), pp. 64–66.

[7] Op. cit., vol. i (8th ed., 1955), p. 681.

[8] 70 C.L.R. 60, 70; *Annual Digest and Reports of Public International Law Cases*, 1943–1945, Case No. 61, at p. 212.

[9] *Gschwind* v. *Huntingdon*, [1918] 2 K.B. 420. See thereon this *Year Book*, 30 (1953), pp. 244, 274, n. 8.

[10] *In re Gogal* (1947), 75 F. Supp. 268.

Nationality, 1930,[1] of which the United Kingdom is one, there is applied to dual nationals the so-called principle of the master-nationality. And various bipartite arrangements adopt either that principle[2] or the rule that service in one State shall render a dual national exempt from service in the other.[3] There are even treaties providing for the application of the latter rule to others than dual nationals.[4] As long ago as 1859 the United Kingdom made arrangements with the Central American States of Costa Rica, Guatemala, Honduras, and Salvador for the exemption of locally-born sons of British subjects (being themselves British subjects) from service during minority.[5] Nevertheless, the general rule is clear.

Another, probably irrelevant, though related, matter is the status of the so-styled declarant alien—the person who has filed an application for naturalization but has not in fact become naturalized. The filing of 'first papers' was a device of the naturalization law of the United States, only recently abandoned. Not unnaturally that country attributed considerable significance to it,[6] and in the Civil, Spanish-American, and First World Wars extended compulsory military service to declarant aliens. During the Civil War there was involved another class of aliens whose situation was similar to but distinct from that of declarants, namely, those who had exercised the franchise in the Western States specifically as aliens, without having become declarants. It was indeed out of the American Civil War that the mass of diplomatic interchanges which constitute the principal authority in the whole matter arose.[7]

III

To the extent that the general problem is not looked on as one which was most acute during the American Civil War it tends to be regarded as one of Anglo-American relations. For another aspect of the problem is revealed in the question adumbrated in *Re Solvang*: that of the status of a naturalized person in the country of his origin. The United Kingdom, as is well known, maintained the rule *nemo potest exuere patriam* until as late as 1870. This circumstance was of course a prime cause of the war of 1812. But it is to be recalled that the right of search, and the right to impress native-born British subjects notwithstanding their naturalization—colourable or otherwise—in the United States, was claimed as exerciseable upon the high sea. The dispute concerning it is not therefore directly relevant to the question of the liability of the alien resident to compulsory service. Nevertheless, President Madison could complain in 1813 that 'In a contiguous British province [i.e. Canada], regulations, promulgated since the commencement of the war, compel citizens of the United States being there under certain circumstances to bear arms. . . .'[1] It is to be remembered, however, that at that date it was not always admitted that the British allegiance of the revolted American colonies had been dissolved by the success of their revolt.[2] Nor was the situation uninvolved. Madison himself complained, quite unjustifiably, of the conduct of the United Empire Loyalists (those native Americans who had withdrawn to Canada after the peace of 1783) in bearing arms against the United States.[3] And though the United Kingdom may have insisted longest upon the doctrine of indissoluble allegiance, the absence of any conscription in Britain after 1815[4] excluded any conflict in this context as a result of the non-recognition of the effects of American naturalization of British subjects. It was, significantly enough, with Prussia, and, equally significantly, because of the compulsory enlistment of American citizens of Prussian origin, that the first of the Bancroft Treaties for the mutual recognition of naturalizations was concluded.[5]

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[1] *Treaty Series*, No. 22 (1937).

[2] Cf. the United States–Norwegian Agreement of 1930, *League of Nations Treaty Series*, vol. 112, p. 399, and the Franco–Belgian Agreement of 1928, ibid., vol. 123, p. 97.

[3] E.g. the Costa Rica–Spanish Agreement of 1930, *L.N.T.S.*, vol. 168, p. 61; the United States–French Agreement of 1948, *United Nations Treaty Series*, vol. 67, p. 33; the Franco-Danish Agreement of 1949, ibid., vol. 48, p. 3; and the Franco-Belgian Agreement of 1949 (superseding that referred to in the preceding note), ibid., vol. 93, p. 87.

[4] E.g. the Franco-Belgian Convention of 1921, *L.N.T.S.*, vol. 8, p. 158. And see the wartime Agreements between the United Kingdom and, respectively, Brazil and Chile, *infra*.

[5] *British and Foreign State Papers*, vol. 63, pp. 273–81.

[6] See the present writer in *Harvard Law Review*, 67 (1954), pp. 1187–1212.

[7] See Wharton, *A Digest of The International Law of the United States* (1887), § 202; Moore, *A Digest of International Law* (1906), § 548; Hackworth, *Digest of International Law* (1942), § 282; *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Alienage*, (1869), Appendix, pp. 41–47; Bernard, *Neutrality of Great Britain during the American Civil War* (1870), ch. xvi; Halleck, *International Law* (3rd ed., 1893), vol. i, p. 558.

No doubt it was the exemplary forbearance with which the British and American Governments behaved in relation to it at that time which causes the problem to be associated so much with the Civil War. For the United Kingdom began by conceding, in the celebrated Instruction to Lord Lyons:

> 'there is no rule or principle of international law which prohibits the Government of any country from requiring aliens, resident within its territories, to serve in the Militia or Police of the country or to contribute to the support of such establishments;'[6]

a declaration very shortly followed by an intimation that although Her Majesty's Government

> 'might well be content to leave British subjects, voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicil, including, when imposed by the municipal law of such country, service in the Militia or National Guard, or local Police, for the maintenance of internal peace and order, or even, to a limited extent, for the defence of the territory from foreign invasion, it is not reasonable to expect that Her Majesty's Government'

should passively allow British subjects to be compelled to serve in the armies in a civil war where, besides the ordinary incidents of battle, they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern.[7] And, though never in fact abandoning its claim to conscript aliens,[8] the Lincoln Administration for its part readily acceded to the British proposal that a *locus poenaetentiae* should be accorded to aliens, within which they might remove from the country rather than perform service.

This whole story is well documented and has been frequently re-told.[9] It is not intended to repeat it here nor to explain once more the influence it has had on the practice of the United States. It will be sought rather to complete the recent history of the matter in so far as the publication of the inter-Allied Agreements of the period of the Second World War permits, and to point out that the reliance by writers upon American practice almost exclusively has tended to produce a possibly false idea as to what the general rule of international law is.

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[1] Speech of 7 December 1813, reproduced in *Report of the Royal Commissioners*, &c., 1869, Appendix, pp. 35–36.

[2] See this *Year Book*, 30 (1953), pp. 244 and 272–3.

[3] See *supra*, n. 1.

[4] Recruitment of the 'Royal Army' was by voluntary enlistment after 1815. The militia ceased to be called out by ballot in 1829.

[5] Cf. *Report of the Royal Commissioners*, &c., 1869, Appendix, pp. 52–55.

[6] Dated 4 April 1861 (before the war broke out); ibid., p. 42.

[7] Ibid.

[8] Cf. statement of the Secretary of State (Fish), 1869; Moore, *Digest of International Law*, vol. iv, p. 57.

[9] See the works cited *supra*, p. 440, n. 7.

IV

American practice has been summed up in part as follows: 'The United States never, in the face of foreign opposition, persisted in the attempt to draft non-declarant aliens; and on three occasions, in 1863, in 1917 and in 1940, following an attempt to draft declarant aliens, the statutory law was modified in order to make room for exemptions.'[1] Opposition has been based occasionally, as on the part of Mexico in 1941, upon the principles of general international law, but more often on treaty.[2] And where opposition has been overcome, as during the Second World War, this has been largely[3] by treaty. Treaties thus come into the story twice over. For, on the one hand, over a long period of time the United States has by treaty guaranteed the immunity of nationals of foreign States from conscription in return for the reciprocal exemption of her own nationals. And, on the other hand, in the course of both World Wars the United States made treaties with her allies for the purpose of securing that the nationals of the latter resident in the United States should serve either in the forces of the United States or in those of their own countries.

Treaty stipulations of the former sort appear to be regarded by American writers as having an exceptional character. They date from as early as the period of the Napoleonic Wars but seem to become general in the eighteen-thirties. From that time until the First World War they were entered into with a considerable number of States, but their effect has been put no higher than as follows: '(1) with the possible exceptions of those with Italy and Japan, they were not concluded with major Powers; and (2) the tendency was general in Latin America and prevalent elsewhere to except aliens from military service. . . .'[4] And, after 1907, the United States 'concluded only three new treaties . . . which contained mutual exemption from military service. One was a re-enactment of the 1894 Japanese Treaty when it became due in 1911. That is now abrogated. The others were the Siamese Treaties of 1920 and 1938, drawn on similar lines, and a hold-over from pre-war days. Every other treaty referring to the subject and that has been concluded since World War I has permitted the drafting of neutral aliens under specified conditions.'[5] It has been concluded in short that the policy of the United States changed after 1918 and that she thereafter sought to meet the situation already encountered in two wars—the situation, that is, that it was found necessary or expedient to allow to foreign nationals the option of departing rather than serving—by stipulating in advance that permanently settled declarant aliens should be amenable to war service subject to the concession to them of a *locus poenaetentiae* within which they might leave the country.[6]

This does not, of course, account for the policy of the United States, begun in 1940, of applying its conscription laws, in peace or war, to aliens, whether declarants or not, subject to an option to refuse service under penalty of permanent ineligibility for naturalization.[7] Nor does a survey of the practice of the United States cover the whole ground. If a somewhat wider survey is made the general position appears rather different. The starting-point of such a survey may nevertheless be the treaty stipulations in favour of the United States. These, it is to be observed, do not stand by themselves. Treaties confined to the question of exemption from military service are rare but not unknown.[1] The United States, however, would not seem ever to have been party to such a treaty. By contrast, the stipulations in favour of that country to which allusion has been made appear as incidental articles in treaties of commerce, amity and commerce, or commerce and navigation. It is noteworthy that the latest example of such a treaty, that concluded with Italy in 1948, contains such a stipulation, incidentally of an apparently new sort which falls between the early model and the later in that it contains an exception to the general exemption provided for, operative 'During any period of time when both of the High Contracting Parties are, through armed action in connexion with which there is general compulsory service, (*a*) enforcing measures against the same third country in pursuance of obligations for the maintenance of international peace and security, or (*b*) concurrently conducting hostilities against the same third country or countries. . . .'[2]

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[1] Fitzhugh and Hyde, *ubi cit.*, p. 375. [2] Ibid., p. 377. [3] *Infra*, p. 451.

[4] Fitzhugh and Hyde, *ubi cit.*, p. 379. For a decision on the treaty with Switzerland (1850) see *Petition of Moser*, (1950) 182 F. 2d 734.

[5] Fitzhugh and Hyde, *ubi cit.*, p. 380. [6] Ibid., p. 380.

[7] See *supra*, p. 439. For a decision upon the relevant measure see *McGrath* v. *Kristensen*, 340 U.S. 162 (Danish national refusing service in 1942). See also *Petition of Moser*, referred to *supra*, n. 4.

V

If with respect to other countries the parallel context is looked to, it is to be seen that the United States has not been alone in securing the exemption of her nationals from foreign military service. The United Kingdom, in particular, has over a very long period of time followed the same practice. As long ago as 1869 the exemption clause in British treaties of commerce and navigation was looked upon as common form and described as 'of essential service to protect British subjects from conscription'.[3]

Perhaps the earliest clear[4] example of such a clause is that in the Treaty of Rio, concluded with Portugal on 19 February 1810.[5] Like stipulations were made with Sicily in the Treaty of London of 1816,[6] with Colombia in 1825,[7] and with 'the United Provinces of Rio de la Plata', also in 1825.[8] The two Treaties last mentioned were still in force, at least in 1939, with Venezuela[9] and Argentina[10] respectively. The existence of the Treaty with Argentina seems incidentally to have been overlooked by those writers who have seized upon the British participation in the French pacific blockade of Buenos Aires in 1856, undertaken because of the compulsory enlistment on the part of the dictator Rosas of alien merchants resident for three years, as showing that the United Kingdom has not always been constant in her view that customary international law does not exclude the conscription of aliens.[11]

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[1] Cf. the Anglo-Danish Declaration of 1869, *infra*.

[2] *Treaties and Other International Acts Series* (United States), 1965.

[3] *Report of the Royal Commissioners*, &c. (1869), Appendix, p. 66, n.

[4] But see the Anglo-Spanish Treaty of Madrid, 1667, Article XVIII: Hertslet, *Treaties of Commerce and Navigation* (1820), vol. 2, pp. 140, 149.

[5] Article VII: Hertslet, op. cit., vol. 2, pp. 27, 37.

[6] Article V: ibid., pp. 131, 135.

[7] Article 9: *Handbook of Commercial Treaties* (1931), pp. 722, 724.

[8] Article 9; ibid., pp. 15, 17.

[9] Ibid., p. 722, n.

[10] Ibid., p. 15.

[11] This statement is made, for instance, by Borchard, op. cit., p. 65, and has been repeated from him by other writers. Borchard cites Fiore, *Le Nouveau droit international public* (2nd ed., 1885), § 647, as his authority, but that work mentions only the blockade by France (alone) of 1838.

The same formula as was used in the earlier treaties was employed in the Treaties of 1849[1] and 1850[2] with, respectively, Costa Rica and Peru. It is to the effect that:

> 'The subjects of Her Britannic Majesty residing in . . . ., and the subjects of . . . . residing in the dominions of Her Britannic Majesty, shall be exempted from all compulsory military service whatsoever, whether by sea or land, and from all forced loans, or military exactions or [and] requisitions; . . .'

In the Treaty with Switzerland of 1865[3] a somewhat different form of words was employed:

> 'The subjects or citizens of either of the two contracting parties in the territories of the other, shall be exempted from all compulsory military service whatever, whether in the army, navy or national guard or militia. They shall also be exempted from all contributions, whether pecuniary or in kind, imposed as a compensation for personal service, as well as from military requisitions, with the exception of lodging and supplies, according to the custom of the country, and demandable alike from citizens and foreigners, for the military on a march.'

The Morocco Treaty of 1856[4] reverted to the earlier formula. But the first sentence of the clause employed in the Swiss Treaty was reproduced in the Treaty with Colombia of 1866[5] and in that with Italy of 1883.[6] The French Treaty of 1882[7] stipulated a reciprocal exemption 'from military service, requisitions, and contributions of war, forced loans, advances, and other contributions leviable under exceptional circumstances in so far as these contributions are not imposed on landed property'. The Treaty with Japan of 1911[8] followed the Swiss Treaty of 1855 both in wording and in providing for exemption from contributions imposed in lieu of personal service. The Treaty with Portugal of 1914,[9] not ratified until 1916, also followed the first 'Swiss clause'. The Treaty with Bolivia of 1911[10] stipulated for exemption from 'extraordinary war contributions, from forced loans, and from all military requisitions or services whatsoever,' and also from army, navy, national guard, and militia service. The clause in the Nicaraguan Treaty of 1905[11] was almost identical.

After the First World War the Treaty with Spain of 1922[12] followed largely the model of the Treaty with Switzerland, the wording of the relevant clause being:

> 'The subjects of each of the contracting parties in the territories of the other shall be exempted from all compulsory military service whatsoever, whether in the army, navy, national guard, or militia. They shall similarly be exempted from . . . all contributions, whether pecuniary or in kind, imposed as an equivalent for personal service, and finally from any military exaction or requisition. The charges connected with the possession by any title of landed property are, however, excepted, as well as compulsory billeting and other special military exactions or requisitions, to which all subjects of the other contracting party may be liable as owners or occupiers of buildings or land.'

But this clause was qualified by the addition:

> 'In the above respects the subjects of each of the contracting parties shall not be

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[1] Article 10; *Handbook of Commercial Treaties*, pp. 126, 128.

[2] Article 9; ibid., pp. 531, 537.

[3] Article 5; ibid., pp. 667, 689.

[4] Article 4: ibid., pp. 422, 423.

[5] Article 16: ibid., pp. 118, 121.

[6] Article 14: ibid.; see also ibid., pp. 369, 373. This instrument appears not to have been revived after the Second World War; cf. United Kingdom Note of 13 March 1948: *U.N.T.S.*, vol. 104, p. 41.

[7] Article 11: *Handbook of Commercial Treaties*, pp. 225, 228.

[8] Article 2: ibid., pp. 384, 385.

[9] Article 2: ibid., p. 546.

[10] Article 8: ibid., pp. 45, 47.

[11] Article 14: ibid., pp. 471, 474.

[12] Article 4: ibid., pp. 624, 625.

accorded in the territories of the other less favourable treatment than that which is or may be accorded to subjects or citizens of the most favoured nation.'

This clause, with the addition set out, was reproduced exactly in the Treaty with Latvia of 1923.[1] The Treaty with Austria of 1924[2] followed exactly the same form, as did that with Estonia of 1926.[3] In the case of Germany (1924)[4] the same formula was again used but with the following addition:

> 'In so far as either of the contracting parties may levy any military exactions or requisitions on the subjects or citizens of the other, it shall accord the same compensation in respect thereof as is accorded to its own subjects or citizens.'

A similar variation appeared in the Finnish Treaty of 1923.[5] The Treaty with Siam of 1927[6] contained a substantially identical provision but with the addition:

> 'British subjects in Siamese territory . . . shall similarly be exempted from all forms of compulsory manual labour (except in cases of sudden and unexpected occurrences involving great public danger . . .). . . .'

The Treaties with Greece (1926)[7] and Hungary (1926)[8] followed the Spanish Treaty exactly, and that with Yugoslavia (1927)[9] the German Treaty. That with Roumania (1930)[10] was exceptional in that, whilst in general following the German model, it specifically provided for the exemption not only of individuals but also of companies from

> '. . . any military or civil requisitions other than such as may be levied on the subjects or companies of the other high contracting party, and [they] shall be accorded adequate payment therefor, which shall in no case be less than the payment accorded in similar circumstances to the subjects or companies of the other high contracting party. . . .'

In a slightly different form the same clause appeared in the Treaty with Turkey of the same year.[11] The Treaty with Turkey is further noteworthy because it makes explicit that the general reciprocal exemption from military service is to apply 'both in time of peace and in time of war'.

Amongst expired treaties containing an exemption clause may be mentioned that with Bulgaria of 1905.[12] A wholly exceptional nineteenth-century British treaty dealing solely with exemption from military service is the Anglo-Danish Declaration of 14 June 1869.[13] And apparently exceptional commercial treaties of Dominions (as distinct from United Kingdom treaties of which a Dominion has the benefit) with exemption clauses are the South Africa–German[14] and Irish Free State–German[15] Treaties of 1928 and 1932. The clauses here are in the same form as in the United Kingdom–German Treaty except that the South African Treaty contains the following additional paragraph:

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[1] Article 4: ibid., pp. 400, 401.

[2] Article 5: ibid., pp. 23, 24.

[3] Article 4: ibid., pp. 183, 184.

[4] Article 7: ibid., pp. 299, 300.

[5] Article 4: ibid., pp. 203, 204. After the Second World War this instrument was revived by the United Kingdom Note of 12 March 1948: *U.N.T.S.*, vol. 104, p. 29.

[6] Articles 7 and 8: *Handbook of Commercial Treaties*, pp. 594, 595, 596.

[7] Article 6: ibid., pp. 325, 327.

[8] Article 5: ibid., pp. 359, 360. This instrument was revived by the United Kingdom Note of 12 March 1948: *U.N.T.S.*, vol. 104, p. 35.

[9] Article 7: *Handbook of Commercial Treaties*, pp. 732, 733.

[10] Article 9: ibid., pp. 577, 579. This instrument was revived by the United Kingdom Note of 12 March 1948: *U.N.T.S.*, vol. 104, p. 117.

[11] Article 12: *Handbook of Commercial Treaties*, pp. 678, 680.

[12] Article 2: *Treaty Series*, No. 1 (1908).

[13] *British and Foreign State Papers*, vol. 59, p. 12.

[14] Article 7: *Handbook of Commercial Treaties*, pp. 312, 313.

[15] Article 5: *Treaty Series*, No. 5 (1932).

> 'For the purposes of this article any subject or citizen of either of the contracting parties who has, under the laws of the other party, become a subject and is domiciled in the territories of the latter party shall be regarded as a subject or citizen of such party.'

General treaties of commerce and navigation were not of course concluded between the United Kingdom and all other States. Or alternatively, they assumed the form of a comparatively short stipulation for most-favoured-nation treatment, as in the Treaty with Czechoslovakia of 1923[1] or in the Treaty with Poland of 1923.[2]

The Agreement with Lithuania of 1922[3] employed a similar formula. The existence of such clauses must have resulted in the securing of reciprocal exemption from military service of British subjects in many countries with which there were no treaty clauses making specific provision to this end.[4] But, whilst the circumstance that the United Kingdom has agreed that nationals of certain foreign States should be exempt from conscription would cause the same benefit normally to accrue for the benefit of nationals of a State entitled merely to most-favoured-nation treatment, whether under a mere most-favoured-nation clause British subjects secured exemption, would of course depend on whether the State concerned had by treaty granted exemption to the nationals of any third State. In some cases it is possible to be certain upon this point—as in the case of Poland, which country had agreed with Denmark in 1923 for the mutual exemption of their respective nationals.[5] In other cases the situation is more obscure. But at all events it is clear that the United Kingdom was, upon the reintroduction of compulsory military service in 1938, bound by a series of treaties with the majority of foreign States, both major and minor, not to extend conscription to the nationals of such States. There was, however, no international duty in this context towards the United States, nor towards the Union of Soviet Socialist Republics.[6]

Upon a consideration of this survey of British practice it becomes clear that the inter-Allied Agreements of both the First and Second World Wars must be looked at afresh. For, from the point of view of the United Kingdom at least, they appear now not as exceptional agreements *permitting* the conscription of the nationals of foreign States, but rather as waivers of the benefit of treaty stipulations *excluding* such conscription. The question remains, however, as to what, in the light of the practice of States, is the rule of customary international law. It is of course a familiar problem as to what is the bearing of a common stipulation in treaties upon customary international law: does the treaty reflect the exception or the rule? Upon this point it is sufficient here to observe that the clauses reviewed are, almost invariably, clauses in commercial treaties, and that a State obviously does not enjoy the benefit of the common-form provisions of a commercial treaty, and in particular of a most-favoured-nation clause, under customary international law.

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[1] Article 1: *Handbook of Commercial Treaties*, pp. 137, 138.

[2] Article 1: ibid., p. 539.

[3] Article 1: ibid., p. 417.

[4] Cf. the claim of the United Kingdom to the benefit of the Transvaal–Portuguese Exemption Treaty (1894), mentioned in *Transactions of the Grotius Society*, 9 (1924), p. 60; see also Moore, op. cit., vol. iv, p. 64.

[5] *L.N.T.S.*, vol. 19, p. 65.

[6] As to France, Italy, Germany, and Japan see the text, *supra*.

VI

If, further, such diplomatic correspondence as is available is examined, it is evident that, quite apart from the case of the American Civil War, the United Kingdom has consistently maintained the viewpoint that a British subject settled in a foreign country cannot be protected from compulsory military service in the absence of treaty. This emerges again and again from the review of the practice over thirty years conducted by the Royal Commissioners for Inquiring into the Laws of Naturalization and Alienage in 1869. Thus in 1862 the British Minister in Buenos Aires was instructed that 'even aliens may under certain circumstances be rendered liable to military service in the country of their domicil, without any violation of international law'.[1] In 1856 the French Embassy was informed that it was no argument in favour of the exemption of French subjects in British Guiana from militia service that Portuguese subjects were exempted, since the privilege of the latter depended on treaty.[2] And against Lord John Russell's observation in 1861, anent an inquiry from the Netherlands, that 'There is no practical liability imposed on aliens in England to serve in the militia, inasmuch as the militia ballot is not in fact resorted to; even their theoretical liability thereto is a matter not free from legal doubt',[3] is to be set the advice given in the same year to a Mr. Foreman, a British subject conscripted in Norway. For it was explained to him that in the absence of a convention he could appeal only to the principles of equity and ask for exemption on the ground that Norwegians were not in practice subjected to military service in England.[4]

No doubt the large numbers of treaty stipulations tended to confuse views as to which was the rule and which the exception. But in 1894 the Law Officers were clear that 'by the general rule, an exemption from compulsory military service did not exist, but that treaties had largely established it'.[5] There is, moreover, some trace of a tendency to distinguish between service for defensive purposes and general or foreign service. Perhaps this is implicit in the instructions to Lord Lyons. Certainly in 1851 the British representative in Hamburg, then one of the cities of the Hanseatic League, was instructed

> '. . . to give way to the liability of British subjects to serve in the Civic Guard for the protection of the city in which they reside, if you should find it necessary to do so; but you should strenuously resist any pretension to require British-*born* subjects, whether admitted or not to the rights of citizenship, to serve in the Hamburgh contingent [of the army of the Confederation], because that contingent is not a force raised and embodied for the maintenance of order within the City and State of Hamburgh, nor even solely for the defence of the Hamburgh State, but is a portion of the army of Germany, and is organised for the purposes of foreign wars, beyond and out of Hamburgh territory, to be waged not merely for Hamburgh interests, but possibly for the interests of any one

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[1] *Report*, &c., 1869, Appendix, p. 61. The instruction did not necessarily ignore the Treaty of 1825 (p. 443, *supra*) as the inquiry which produced it anticipated the recognition of the State of Buenos Aires as a belligerent at war with Argentina.

[2] *Report*, &c., 1869, pp. 66–67. The Treaty in question was that of 1842, Article 1 of which repeated the stipulation of the Treaty of 1810 (p. 443, *supra*). But the French Embassy was informed in addition that the exemptions provided for 'appear to Her Majesty's government to be so manifestly inexpedient and objectionable in principle that they have now under consideration the propriety of opening negotiations for an alteration of the Treaty in this respect'. Apparently this was not done, as the stipulation still appears in the Treaty with Portugal of 1914 (p. 444, *supra*).

[3] *Report*, &c., 1869, Appendix, p. 71.

[4] Ibid., and see Borchard, op. cit., p. 65.

[5] Borchard, *ubi cit.*

of the other States of Germany; and the making of such a war would not depend upon the will and decision of the Government of Hamburgh, but upon the will and decision of the Central Diet.'[1]

But the phraseology here used is explicable on the basis of the peculiar constitutional and international status of Hamburg.

Equally, it is hazarded that the distinction between service 'in the Militia or National Guard, or Local Police, for the maintenance of internal peace and order, or even, to a limited extent, for the defence of the territory from foreign invasion' and some more general service, drawn in the instructions to Lord Lyons,[2] is explicable upon the basis of the factual situation which provoked these instructions. For the unspecified alternative was clearly service upon one side in a civil war. In the same manner one must read in the light of the times the Opinion of the Law Officers that British subjects in Mexico should be called upon to serve in the police, or to pay a tax for exemption, 'but not in the National Guard, which might be used for active military service'.[3] For this Opinion was given in 1865 and thus at a time when a civil conflict was in progress in Mexico.[4]

Yet, if the English writers are looked to, it is to be seen that they have seized upon this distinction between service in the nature of police duties and regular military service and applied it out of context. The heresy is traceable from Oppenheim[5] through Hall[6] to Bluntschli.[7] Such were the authorities upon which the High Court of Australia principally relied in *Polites*'s case.[8] Nor, perhaps, is it only in neglecting to note the significance of the circumstances in which Lord Lyons was given his instructions—namely, that a civil war was expected or actually taking place—that Hall, following Bluntschli, misinterprets these instructions. For these writers confine the case in which an alien may be compelled to defend the country of his residence against an external enemy to that in which 'the existence of the social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilised nations'.[9] There is nothing, however, in the words used to Lord Lyons to suggest that this was the only circumstance which the United Kingdom Government had in mind. It would appear more likely that what was contemplated was service in a war in which the United Kingdom was allied with the State of residence of British subjects called to military duty. An attitude of this sort is implicit in the dispatch to the British representative at Hamburg already quoted, which continues: 'It might thus happen . . . that British subjects might be brought, without, and even against, their will, into conflict with the troops of States in amity or alliance with England. . . .'[1]

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[1] *Report*, &c., 1869, Appendix, p. 68.

[2] *Supra*, p. 441.

[3] *Report*, &c., 1869, Appendix, p. 70.

[4] Cf. also the acknowledgement by the Government of Guatemala 'that the discharge of these duties [i.e. military service] in a new country, and where the Government and Laws are also new, and not sufficiently firm, must be grievous in case of civil war': ibid., p. 69. This was the motive for the concession of exemption to locally-born British subjects during minority, as to which see p. 440, *supra*.

[5] Op. cit., vol. i (8th ed., 1955) p. 209, n. 2, referring to Hall. This note refers also to the *Tunis and Morocco Nationality Decrees case* (1923), *Publications of the Permanent Court of International Justice*, Series B, No. 4. Whilst it is true that one of the grounds for the British objection to the French Decrees in that case was that, if the British subjects whose position was in question became local subjects, they would lose the benefit of the treaties securing them exemption from military service, the Opinion of the Court does not touch the question of the liability of foreign nationals to military service.

[6] *A Treatise on International Law* (8th ed., 1924), § 61, citing the instructions to Lord Lyons (p. 441, *supra*) and Bluntschli.

[7] *Le Droit international codifié* (1895), again referring to the instructions to Lord Lyons.

[8] 70 C.L.R. 60, 70, 75–77, 79.

[9] Hall, op. cit., pp. 260–1.

The same dispatch continues further: 'British subjects might . . . actually be compelled to take the field against the troops of their own country and sovereign.'[2] At such a point the obvious limit of the compellability of aliens to military service is reached, and the British Government has on several occasions made such pronouncements as that '. . . in the case of persons owing permanent allegiance to the British Crown, but domiciled or resident [in a foreign country], the claim to exemption from military service [in such country] cannot justly be extended on their behalf to any services required for legitimate purposes of internal defence only, and which do not involve any act at variance with the duties of their British allegiance'.[3]

The difference between a rule that a resident alien can be conscripted for any lawful military service other than against the State of which he is a national and a pretended rule which would confine his amenability to service of a police character or in aid of the defeat of an attack by mere savages is of course enormous and cannot be overestimated in the light of the nature of modern war. It is, in summary, suggested that British practice supports the former rule rather than the latter distortion.

Finally, it may be pointed out that there has been misconstruction of the British attitude on yet another aspect of the matter: the question as to whether an alien is entitled to depart instead of submitting to legitimate conscription. This, as has been seen, is a view which tends to be taken in the United States.[4] The British acceptance as reasonable of a concession of a *locus poenaetentiae* during the American Civil War[5] might suggest a similar attitude. It is submitted, however, that it does not. The preoccupation of the British Government during the American Civil War in connexion with the extension of conscription to aliens was not so much with the legality of the relevant measure as such as with its application to persons who had entered the country before its enactment and therefore with certain expectations which were now to be disappointed. Hence in 1862 the British consuls in the southern States were directed to protest against Confederate conscription on the ground that

> 'British subjects domiciled only by residence in the so-called Confederate States cannot be forcibly enlisted in the military service of these States by virtue of an *ex post facto* law, when no municipal law existed at the time of the establishment of their domicil, rendering them liable to such service. It may be competent to a State in which a domiciled foreigner may reside to pass such an *ex post facto* law, if at the same time option is offered to foreigners affected by it to quit after a reasonable period the territory, if they object to serve in the armies of the State: but without this option such a law would violate the principles of international law; and, even with such an option, the comity hitherto observed between independent States would not be very scrupulously observed.'[6]

In 1865 a similar protest was directed to be made against the Mexican Decree imposing nationality on foreigners purchasing land 'in so far as it is made retrospective . . . [so that] time . . . [might] . . . be allowed to such aliens to determine whether they would retain their property, and to enable them to dispose of it without injury or loss accruing from this *ex post facto* law'.[7] It is therefore apprehended that there is nothing in British practice to suggest that a settled alien must be allowed an opportunity to escape by departure the effects of a conscription law in force at the date of his arrival.[1]

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[1] *Report*, &c., 1869, Appendix, p. 70.

[2] Ibid.

[3] Dispatch to the Ambassador to Spain, 1682; *Report*, &c., 1869, Appendix, p. 74.

[4] See p. 442, *supra*.

[5] See p. 441, *supra*.

[6] *Report*, &c., 1869, Appendix, p. 43.

[7] Ibid., p. 71.

VII

It remains to conclude this Note with some mention of the inter-allied agreements with respect to the conscription of aliens of the period of the Second World War.[2] In Great Britain, International Labour Force Orders were issued under the Defence Regulations in 1941 in respect of Belgian, Netherlands, Norwegian, Polish, Czechoslovak, and French nationals.[3] All these Orders, save that in relation to French nationals, recited that they were made pursuant to agreement between the United Kingdom Government and the appropriate foreign governmental authority (which was in every case a Government-in-exile or Provisional Government established in the United Kingdom) that it was expedient to make provision regulating the engagement in Great Britain by employers of the foreign nationals concerned. A subsequent Order applied to Austrian, German, and Italian nationals well disposed towards the allied cause.[4] No texts of agreements relating to these Orders are apparently available; presumably they were not of a detailed character. The National Service (No. 2) Act, 1941,[5] imposed a general obligation of service, in the forces or otherwise, upon all persons for the time being in Great Britain (*sc.* without distinction of nationality). This was followed by the Allied Powers (War Service) Act, 1942,[6] which in terms enabled the application of the National Service Acts to any allied national not being a member of the forces of the Power of which he was a national as if he were a British subject. But it was stated during the debate on the Bill which became the Act that it was not intended to apply it to the nationals of any particular country without agreement with the appropriate foreign governmental authority.[7] The Orders[8] made under the Act with respect to Belgian, Czechoslovak, Greek, Netherlands, Norwegian, Polish, and Yugoslav nationals and, subsequently, to American and French nationals, did not, however, recite any such agreements, and no texts of such agreements are apparently available.

There have, however, been published the texts of Agreements between the United Kingdom and, respectively, Brazil[9] and Chile.[10] The first of these was expressed to

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[1] In *Netz* v. *Chuter Ede*, [1946] 1 All E.R. 628, 634, Wynn-Parry J. expressed the view that 'expulsion of an alien enemy may be regarded as a lesser exercise of sovereign power than the internment of such a person. In the latter case, the individual is deprived of his liberty whereas, in the former, he retains his liberty and is under no greater disability than that which follows from the absence of licence or permission to enter or remain within the Kingdom.' It may not necessarily follow that the conscription of a settled alien *amy* is more onerous than his expulsion.

[2] As to the Agreements of the period of the First World War see *American Journal of International Law*, 12 (1918), Supplement, p. 265 (United Kingdom–United States), the Military Service (Conventions with Allied States) Act, 1917, 7 & 8 Geo. V, c. 26, Cmd. Nos. 8588 (Russia), 8691 (France), 8694 (Italy), 9101 (United States), and 9103 (Greece). See also S.R. & O. 1917, Nos. 871, 1216; 1918, Nos. 52, 1105, 1225.

[3] S.R. & O. 1941, Nos. 719–24.

[4] S.R. & O. 1941, No. 1020.

[5] 5 & 6 Geo. VI, c. 4, s. 1.

[6] 5 & 6 Geo. VI, c. 29, s. 1.

[7] Cf. Oppenheim, op. cit., vol. i (8th ed., 1955), p. 681, n. 1; Schwelb in *American Journal of International Law*, 38 (1944), pp. 50, 56; 39 (1945), pp. 109, 110. See also the text of the British Note to the United States Government referred to *infra*.

[8] S.R. & O. 1943, No. 381; 1944, Nos. 991, 992.

[9] Exchange of Notes of 27 May 1944: *U.N.T.S.*, vol. 2, p. 235. The Agreement was expressed to be retroactive to 3 September 1939 and was made for a period of one year beyond the cessation of war against the common enemy. By a subsequent Exchange of Notes its period was extended until one year after the cessation of war with Japan: ibid., vol. 67, p. 356.

[10] Agreement of 27 October 1947: *U.N.T.S.*, vol. 82, p. 209; *Treaty Series*, No. 83 (1948).

'authorise' nationals of the one contracting party to engage in military or other public service for the other and provided that the performance of such service should entitle an individual to exemption from service within his own State. The second, which was largely of retroactive effect, was in similar terms.

In so far as citizens of the United States in the United Kingdom and British subjects of United Kingdom origin in the United States were concerned, the United Kingdom fell in with the proposals of the United States. These were embodied in a Note dispatched to the British Ambassador in Washington and to the representatives of other Allied Governments on 30 March 1942.[1]

The United Kingdom accepted the offer subject only to procedural qualifications, and simultaneously notified the United States Government of the terms of the Bill which later became the Allied Powers (War Service) Act, 1942.[2]

Of the remaining members of the Commonwealth, Australia,[3] New Zealand,[4] Canada[5] and South Africa[6] likewise replied accepting the proposals of the United States. They were similarly accepted on the part of India.[7]

Of other countries, the following accepted identical proposals of the United States at various dates: the Netherlands,[8] Yugoslavia,[9] Belgium,[10] Norway,[11] Cuba,[12] Poland,[13]

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[1] *U.N.T.S.*, vol. 13, p. 169.

[2] Ibid., vol. 13, pp. 169, 178.

[3] Ibid., p. 125.

[4] Ibid., vol. 105, p. 139.

[5] Ibid., p. 179. In his reply the Canadian Minister stated that 'The policy of the Canadian Government and Canadian legislation have been based on the assumption that measures applying compulsory military service to aliens should be founded upon agreement with the interested Governments. [It] is of the opinion that difficulties might arise if there were general recognition of the right to conscript aliens, implying corresponding rights in other countries to conscript Canadian nationals. [It], however, does not wish to raise a legal objection at the present time.' The transfer of nationals of the one country already serving in the forces of the other was facilitated by a distinct Agreement: ibid., p. 169.

[6] Ibid., p. 269.

[7] *U.N.T.S.*, vol. 13, p. 185. The reply of the Agent-General for India pointed out that strict reciprocity was not possible as there was no conscription law for United States citizens in India, but stated that 'The Government of India . . . has no objection to the Government of the United States calling up its citizens in India for military service.'

[8] Ibid., p. 151. The reply of the Netherlands Minister stated, however, that 'my government cannot but express its great disappointment at the policy adopted by the United States Government which will prevent an important number of Netherlands subjects to fulfill their military duties in the armed forces of their own country, while it also seriously hampers the efforts of the Netherlands Government to reinforce their military effectives. . . . The Netherlands Government regrets that apparently no alternative is left but to comply with the proposals in question, although they are being felt as a considerable handicap on the Government's constant endeavour to prepare for the liberation of its country from the invader as one of its contributions to the combined war effort.'

[9] Ibid., p. 199.

[10] Ibid., p. 211. The Belgian Ambassador's reply contained a protest similar to that made by the Netherlands Minister and alluded also to the needs of Belgian colonial territory. It further pointed out that Belgian law did not render aliens liable to military service; 'The Belgian Government had, therefore, reason to expect that Belgians residing in the United States of America be given the same treatment. . . .' It nevertheless gave the undertakings required, subject to the understanding that the Belgian Government was not to be prevented from informing non-declarant Belgians in the United States of their obligations of service under Belgian law, nor from enforcing the provisions of that law and of the Naturalization Convention of 1868 against persons who were already *insousmis*.

[11] Ibid., p. 335. In reply, the Norwegian Ambassador states that in the opinion of his Government the proposals were inconsistent with the United States–Norway Treaty of Friendship and Commerce of 1928 but that that Government did not 'at the present time, wish to raise legal objections, based on treaty rights'.

[12] Ibid., p. 379.

[13] Ibid., p. 395. The Polish Government did not wish to agree not to accept enlistments of declarants in the United States. The modification was unacceptable to the United States.

Brazil,[1] Czechoslovakia,[2] El Salvador,[3] Mexico,[4] Greece,[5] Colombia,[6] China,[7] Ecuador,[8] Venezuela,[9] Peru[10] and Chile.[11]

It is perhaps not easy to assess the assumptions as to the general rule upon which these various arrangements were based. Probably they involved a claim of right upon the part of the United States, and a concession of the like right to the other contracting States, to extend conscription to aliens present within the territory, coupled with an agreement to waive the right claimed with respect to any individual other than a declarant alien upon condition of his serving in the forces of his own country rather than in those of the United States.

CLIVE PARRY

THE EXHAUSTION OF LOCAL REMEDIES: SUBSTANCE OR PROCEDURE?

I

THE rule of the exhaustion of local remedies is one of the favourite objections or defences to international claims. There are few systematic writers on international law who have not passed upon it. And yet the construction of the rule still does not appear to be complete. The object of this Note is to consider in what classes of international claim it is a rule of substantive law, or operates as a procedural bar only, or is wholly inoperative; for these three possibilities have not always been sufficiently distinguished. In particular, little regard has been given to the second possibility, that there may be cases where the rule operates as a procedural bar only, and to the results that may follow in practice if this is so. Despite the attentions of tribunals and writers, the structure of the rule remains elusive and hard to separate from the closely associated rules as to State responsibility and denial of justice.

Borchard sets out[12] several grounds for the rule as a limitation upon the right of diplomatic interposition: an alien is presumed to take the local law and means of redress available into account; the respondent State must be given an opportunity of doing justice in its own regular way, and is entitled to maintain its courts free of interference; the exhaustion of local remedies is necessary to establish beyond doubt that the wrongful act or denial of justice complained of is the deliberate act of the State, and that it is willing to leave the wrong unrighted. This reasoning does not distinguish between the moments of State responsibility and of diplomatic intervention, between the cause of action and the right of action. Hudson has taken a similar view of the substantive character of the rule. The exhaustion of local remedies is not, he has said,[13] 'a condition of international jurisdiction, but rather a rule of substantive law. While the State of which the claimant is a national may at any time protest concerning the treatment being accorded to its nationals, while it may institute a proceeding, if a competent tribunal exists, for the purpose of establishing that certain treatment is required by international law, it will lack a basis for presenting and prosecuting the particular claim of its national so long as adequate remedies are available to him under the law of the respondent State.' But there is an ambiguity in the word 'adequate' here. To say that the rule is substantive is to say that no international responsibility arises until the claim has been rejected by the local courts or authorities; how then can responsibility depend upon whether the local remedies are adequate and available? In the *Finnish Ships* case, the Arbitrator drew attention to two cases,[1] heard by the United States–Great Britain Claims Commission, 1871, in which the private claimants were excused for not having appealed to the local courts because of distant residence and of the impossibility of communicating with counsel. The Arbitrator observed of these two cases: 'If the international breach does not come into existence until the private claim is rejected by the highest competent municipal court, then the recourse to that court is a matter of substance and not of procedure, and it is difficult to see how, if such is the case, an excuse such as the one put forward in these cases could have been accepted.'[2]

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[1] *U.N.T.S.*, vol. 28, p. 385.

[2] Ibid., vol. 29, p. 369.

[3] Ibid., vol. 105, p. 205.

[4] Ibid., p. 259. The Agreement with Mexico assumed a somewhat unusual form and provided, broadly, that each State should treat the resident nationals of the other in the same manner as its own nationals.

[5] Ibid., p. 227.

[6] Ibid., vol. 109, p. 287.

[7] Ibid., vol. 107, p. 43.

[8] Ibid., vol. 121, p. 265.

[9] Ibid., p. 273.

[10] Ibid., p. 283.

[11] Ibid., p. 291.

[12] *Diplomatic Protection of Citizens Abroad* (1915), § 381.

[13] *International Tribunals* (1944), p. 189.

In short, to state without qualification that the local remedies rule is a substantive rule is to construe it in a way which does not cover the cases of 'initial' breaches of international law or acts in breach of international law which do not contravene the local law; and it has been widely recognized that there are instances of State responsibility where the local remedies rule operates as a rule of procedure in international jurisdiction. For example, Eagleton has said: 'Responsibility arises from an internationally illegal act, and is not necessarily contingent upon local redress';[3] Freeman, speaking of 'initial' breaches of international law, says: 'with respect to original violations of international law prior to and unconnected with the administration of justice, it [the exhaustion of local remedies] is a procedural condition of diplomatic interposition';[4] and similarly Fitzmaurice: 'Where there has been an original wrong on the part of the State followed by a failure to redress it, amounting to a denial of justice, the denial may be a necessary condition of intervention but it is not the ground of it.'[5] Even the following formulation of the Hague Codification Conference of 1930, though treating the rule as substantive, is limited by the italicized words and does not preclude a procedural function for the rule in certain cases: 'The State's international responsibility may not be invoked *as regards reparation for damage* sustained by a foreigner until after the exhaustion of the remedies available to the injured person under the municipal law of the State.'

Among the authorities there are then to be found two constructions of the rule, the one stressing its substantive and the other its procedural character; neither construction is fully elaborated, and they tend to overlap. In the most recent and, it may be said with respect, the most penetrating study of the rule,[6] Professor Verzijl distinguishes these theories as follows: According to the first or substantive theory, the exhaustion of local remedies by the injured person is the condition precedent to the accrual of international liability of the State (*la condition indispensable de la naissance de la responsabilité internationale*); this theory distinguishes liability for injury to the alien under the local law

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[1] Moore, *International Arbitrations*, pp. 688–90, 3152–9.

[2] *Finnish Vessels in Great Britain during the War* (1934): *Annual Digest and Reports of Public International Law Cases*, 1933–4, Case No. 91, at p. 237.

[3] *The Responsibility of States* (1927), p. 97.

[4] *International Responsibility of States for Denial of Justice* (1938), p. 407.

[5] 'The Denial of Justice', in this *Year Book*, 13 (1932), p. 93, at p. 96.

[6] *Annuaire de l'Institut de Droit international*, 45 (1954), p. 5.

(*la responsabilité interne*) from international liability (*la responsabilité internationale*) which arises, even in the case of a wrong committed by State agents, only 'à la suite d'un recours infructueux du lésé aux tribunaux internes, c'est à dire qu'en cas de déni de justice dans son sens restreint propre'. According to the second theory, the exhaustion of local remedies is a condition precedent to the exercise of the right of diplomatic protection of the alien injured. But the rule does not operate simply as a procedural bar to the right of action by diplomatic or judicial process; it operates to interpose an obligation of the respondent State to make local remedies available. The subscribers to this theory, says Professor Verzijl, having regard to State practice, take the following view: 'Bien que, dans certains cas, le fait dommageable née par lui-même la responsabilité internationale, cela ne veut pas dire que cette responsabilité ait comme corollaire direct et automatique le droit d'agir par la voie diplomatique ou juridictionnelle internationale; elle ne comporterait provisoirement, pour l'État responsable, que le seul devoir d'ouvrir au lésé les voies de recours de l'ordre juridique interne.' In short, the respondent State is obliged, but also entitled, to provide a local remedy.

The obvious defect of the first theory is that it does not cover the case[1] where there is no breach of the local law and therefore no local remedy; the obvious defect of the second theory is that it assumes that there *is* a breach of international law and that the respondent State acknowledges it. But what if the respondent State denies the breach? Nothing can apparently be done to bring its international responsibility home to it.

II

It may help to set out the three possible legal situations in which the operation of the local remedies rule has to be considered.

Case I: The action complained of (*le fait dommageable*) is a breach of international law[2] but not of the local law.

Case II: The action complained of is a breach of the local law but not of international law.

Case III: The action complained of is a breach both of the local law and of international law.

One general remark may be made on these three cases before they are considered in more detail, which is this: they suggest that the local remedies rule is really a conflict rule. It is, when properly constructed, a rule for resolving conflicts of jurisdiction between international law and municipal tribunals or authorities; the rule determines when and in what circumstances the local courts, on the one hand, and international tribunals, on the other, must or may assume jurisdiction over the issue. A conflict of jurisdiction would arise in this sense in the second and third cases above, and it may be in place here to refer to the numerous bilateral treaties for the pacific settlement of disputes[3] in which the limits of jurisdiction of national and international tribunals are defined. These treaty provisions have, with minor variations, a basic common form which may be found, for example, in the Arbitration Treaty of 1928 between France and the Netherlands, Article 5 of which provides: 'In the case of a dispute the occasion of which according to the municipal law of one of the parties falls within the competence of the national courts of such party, the dispute shall not be submitted to the procedure laid down in the present Treaty until a judgment with final effect has been pronounced by the competent national judicial authority.' In some instances (i) administrative tribunals are included within the meaning of 'national courts', (ii) there is further provision that the decision of the national court must be given within a reasonable time, (iii) an international procedure of conciliation is also excluded until the local remedies are exhausted,[1] (iv) an exception is made that where there has clearly been a denial of justice the treaty procedure may be invoked before the national courts have given any final judgment,[2] (v) provision is made that the dispute shall not be submitted to the treaty procedure pending the national courts' decision, and in other instances it is provided that the defendant party may oppose submission of the dispute pending such a decision. The conflict of jurisdiction does not appear to be wholly resolved in the last two instances; for the question whether or not there has clearly been a denial of justice must be determined by an international tribunal. But in the case where it rests with the respondent State to oppose submission of the dispute to such a tribunal if it chooses, it does not appear how the question can be determined, since all reference to international jurisdiction can be prevented *ab initio*. The exception for denial of justice therefore needs more careful drafting than it has received in some of these treaties.

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[1] For example the *Nottebohm* case: *Liechtenstein* v. *Guatemala, I.C.J. Reports*, 1955.

[2] That is to say, a breach of an international agreement or of a customary rule of international law.

[3] Collected in *U.N. Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948.*

Let us now consider the three cases already stated, bearing in mind that the local remedies rule is in effect a conflict rule.

In the first case, where the action complained of is a breach of international law but not of the local law, the local remedies rule does not *ex hypothesi* come into play at all; for, since there has been nothing done contrary to the local law, there can be no local remedies to exhaust. There may, however, be two possible exceptions: where the local law provides for an extraordinary remedy by way of constitutional appeal or where under the local law the injured party may claim damages in the courts for a breach of international law as such. In the first instance there may be a procedure available by which the injured party may contest and have determined by the courts the constitutionality of the law or regulations which have been applied against him; in the second instance the Constitution of the respondent State may establish the primacy of international law and may make a breach of international law actionable in the courts at the suit of a person injured by an act of the respondent State committing the breach. Both these instances would, however, fall under the third case above, and, in the absence of such exceptional remedies, the responsibility of the respondent State for the breach of international law would not be qualified by the local remedies rule. In other words, as Verzijl has pointed out,[3] this is not a case of 'derogation from or exception to the rule of the exhaustion of local remedies, but an instance of the general rule as to State responsibility'. Verzijl cites as examples which would fall under this first case: the molestation of an ambassador; an injurious act of the legislative or highest executive authority in the State, where such act is not remediable by constitutional appeal or other process; an act in direct breach of a treaty obligation of the State; and a crime against peace or humanity by an agent of the State.

In the second case, where the action complained of is a breach of the local law but not initially of international law, the international responsibility of the State is not engaged by the action complained of: it can only arise out of a *subsequent* act of the State constituting a denial of justice to the injured party seeking a remedy for the original action of which he complains.

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[1] E.g. Portugal–Switzerland, Treaty of Conciliation, Judicial Settlement and Arbitration, 1928, Article 19.

[2] Chile–Denmark, Treaty of Conciliation, 1931, Article 2 (1). See also Colombia–Italy, Treaty of Conciliation and Arbitration, 1932, Article 2 (2), which is confined only to cases of denial of justice.

[3] Op. cit.

The third case is the critical and difficult case. Let us take an imaginary instance. By a trade agreement between State *A* and State *B* it is provided that State *A* will, through a State purchasing agency, buy from private suppliers in State *B* ten million tons of coal, taking delivery under each contract of purchase and sale by instalments over a period of two years. It is further provided that disputes as to the application or interpretation of the agreement shall be referred to the International Court of Justice. State *A* negotiates and concludes contracts with private suppliers in State *B* for the purchase and delivery of the whole agreed quantity, and it is admitted that these contracts are governed by the law of State *A*. After taking delivery of instalments of coal under each of the contracts for one year, State *A*, for reasons of policy but in breach of its contracts according to its own law, refuses to take delivery of or pay for further instalments under any of the contracts. All the private suppliers are nationals of and resident in State *B*, but under the law of State *A* they are entitled to sue that State in its courts upon the contracts.

Here there is a breach of the local law of the respondent State *A* and also a breach of the trade agreement between State *A* and State *B*. In such a case, some writers have not always distinguished the two breaches involved. Thus there is sometimes a tendency to treat the rule of the exhaustion of local remedies as substantive, and to deny in the present case the right of State *B* to invoke international judicial process on the ground that State *A* is not internationally responsible so long as the private suppliers have not sued upon the contracts in its courts. For example, Fachiri has said:[1] '[International] responsibility is incurred, where, but only where, the matter complained of, being the direct act of the government, itself constitutes a breach of international law. But although the initial breach of international law gives rise to international responsibility an international claim by the government of the injured individuals does not lie unless and until they have exhausted their local remedies, if any.' It is true that the learned writer speaks of the breach of international law as giving rise to international responsibility, but it is difficult to understand what kind of responsibility this can be, if in our case State *A* is not bound to answer any claim made by State *B* pending the exhaustion of local remedies. To say that the State is internationally responsible seems in such a formulation to be saying over again that it is in breach of international law and to be adding nothing to that statement. It may be asked further how, given the fiction that in international law the claim in our present case is not that of the private suppliers but of State *B* for injury to itself in their persons, local remedies sought and obtained by the private suppliers on their contracts are necessarily adequate remedies for State *B* for breach of the trade agreement. It may be to avoid these difficulties that other writers have claimed for the respondent State a right to discharge its international responsibility in its own way. So Eagleton has said: 'Whether the State has an anterior responsibility or not, it must usually be permitted to use its own agencies of redress where it has provided them.'[2] Schwarzenberger, in indicating the rationale of the *Finnish Ships* case, seems to be making a similar suggestion when he says:[3] 'In such a case [of initial breach of international law] local remedies must be considered to be exhausted if the claim of the foreign owners has been investigated and adjudicated upon by the competent municipal courts up to the last competent instance. The government has then had sufficient opportunity of doing justice to foreign claimants and in accordance with its own municipal law.' But the principle that a respondent State should have a reasonable opportunity for repairing a breach of international law before international judicial process is invoked against it, appears rather to be a principle of international comity than of international law. In the present case, where there is a breach both of the local law and of international law, it does not appear to be satisfactory to treat the rule of exhaustion of local remedies as having substantive effect or to justify its application by a subsidiary rule to the effect that a respondent State is entitled to discharge its international responsibility in its own way, either by the application of a regular local remedy or by prerogative action.

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[1] In this *Year Book*, 17 (1936), at p. 33.

[2] Op. cit., p. 99.

[3] *International Courts* (2nd ed.), p. 235.

Verzijl, on the other hand, in his draft resolution[1] presented to the Institute of International Law, goes far towards saying that, where there is a breach both of the local law and of an international agreement in one act, then intervention by the injured State is permissible even though the normal local remedies have not been exhausted. This is logically sound, for, to return to our imaginary case, the breach of the trade agreement and the breach of contract belong to different legal orders and there is no reason why satisfaction for one should be made to wait or depend upon satisfaction for the other. But in practice it is not really desirable that international jurisdiction should be invoked in a matter with which national courts can, probably quite satisfactorily, deal.[2]

It is submitted then that in our third case the requirement of the exhaustion of local remedies should operate as a *procedural* bar but a procedural bar only. The rule may then be pleaded by the respondent State as a preliminary objection to the admissibility of the claim, *so far as the claim is for judgment on the merits and damages*. But the rule would in these circumstances not be admitted by way of preliminary objection if the claim is not for judgment and damages but for a declaration only.

The International Court of Justice is not prevented by the terms of its Statute from rendering declaratory judgments,[3] and in the second case cited the Permanent Court said: 'The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the parties: so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.' A declaratory judgment therefore seems apt to the case where there is an initial breach of international law by an act of the respondent State which is also a breach of the local law, giving rise to local remedies under it. By seeking and obtaining a declaratory judgment only, that the respondent State was in breach of international law, the claimant State would establish its position in international law, with all the psychological advantage which that draws after it, while the respondent State would not be prejudiced in its chances of remedying the injury locally.

To sum up, it is suggested that:

1. Where the act complained of is a breach of an international agreement or of customary international law, but not of the local law, the rule of the exhaustion of

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[1] Op. cit., p. 106.

[2] See, for example, the *Panevezys-Saldutiskis Railway* case (1939), *P.C.I.J.*, Series A/B, No. 76, p. 18, *per Curiam:* 'In principle, the property rights and the contractual rights of individuals depend in every State on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals.'

[3] *German Interests in Polish Upper Silesia* (1926); *P.C.I.J.*, Series A, No. 7, p. 19; *Interpretation of Judgments Nos.* 7 *and* 8 (1927): ibid., Series A, No. 13, pp. 20, 21.

local remedies is not applicable and cannot support a preliminary objection or defence to a claim;

2. Where the act complained of is a breach of the local law but not of international law, the rule operates as a substantive bar to any international claim: and no such claim arises until a denial of justice can be shown;
3. Where the act complained of is a breach both of the local law and of an international agreement or customary international law, the rule of the exhaustion of local remedies operates as a procedural bar to an international claim for damages but is not a bar to a claim for a declaratory judgment by an international tribunal that there has been a breach of international law;
4. In Cases 2 and 3 the burden of proof rests upon the respondent State, if it relies upon the rule as a preliminary objection or defence, to show that local remedies were available; if it discharges this burden, the burden of proof falls on the claimant State to show that the local remedies indicated were not in the circumstances of the case effective.

J. E. S. Fawcett

NATIONALITY IN 'C' CLASS MANDATES

In *Wong Man On* v. *The Commonwealth and Others*,[1] the High Court of Australia considered the effect of belligerent occupation by the forces of the Crown on the status of the inhabitants of enemy territory, and also the question of the nationality of inhabitants of 'C' class Mandates. The case is of interest in that the Court quoted and substantially relied on the opinions of several textbook writers on the issue whether 'C' class Mandates became subject to the sovereignty of the mandatory power. The action was brought against the Commonwealth, a Minister of State administering the War-Time Refugees Removal Act, 1949, and an officer in the Minister's Department. The Act in question authorized the expulsion from the Commonwealth of aliens who entered Australia during the period of hostilities. The Minister was required to certify that a person was one of the class contemplated by the legislation, and his certificate was stated to be prima facie evidence of the fact so certified. The Minister certified that the plaintiff was one of the class contemplated, and signed an order for his deportation. The plaintiff pleaded that he was not an alien, and alleged trespass to his person.

The issue turned on the question whether the plaintiff, who was born in 1916 in New Guinea, was a British subject by birth, or had become one in virtue of the Mandate over that territory which came into operation in 1921. The Commonwealth legislation on nationality designates as a British subject 'any person born within his Majesty's dominions and allegiance', and this repeats the relevant provisions of the Imperial legislation in operation in 1916. In September 1914 Australian forces had occupied New Guinea, and on the 12th of that month the Officer Commanding issued a proclamation which recited that the Island of New Britain had been militarily occupied, and the authority of the German Government had ceased to exist therein. A formal surrender was accepted, and the instrument recited that during the occupation the local law should remain in force as far as consistent with the military situation. Until 9 May 1921 the territory remained subject to the British Military Administration. The New Guinea Act, 1920–1935, which came into force on that date, recited that a Mandate was to be issued to the Commonwealth in respect of German New Guinea,

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[1] (1952), 86 C.L.R. 125.

'with full power to administer the same, subject to the terms of the Mandate, as an integral part of the Territory of the Commonwealth'.

The plaintiff relied on the fact of British military administration at the time of his birth, or alternatively on the words 'as an integral part of the Territory of the Commonwealth', which appear in the Mandate itself as well as in the preamble to the Act. The first proposition was readily dismissed. Belligerent occupation does not involve a change of sovereignty, and persons born during the occupation do not *ipso facto* become nationals of the Occupying Power. The words 'conquered by the British arms' employed in *Campbell* v. *Hall*[1] were equivalent to 'annexation' or 'subjugation' and not to 'belligerent occupation'. The theory of 'temporary sovereignty' was held to have been long rejected. The second proposition occasioned more difficulty. In the High Court in 1924[2] Isaacs J. had said that the words 'integral part of the Territory of the Commonwealth' meant not that the mandated territory was deemed to be physically part of the territory of the mandatory, but that it was territory belonging to the King in right of the mandatory. The plaintiff in *Wong*'s case relied on this statement to support his assertion that New Guinea had been incorporated in the Commonwealth of Australia, so that British nationality had extended to its inhabitants under the rule in *Campbell* v. *Hall.*

The original draft of the Covenant of the League provided that 'C' class Mandates were to be administered as *if* integral portions of the mandatory's territory. On the suggestion of the Japanese delegate the word 'if' was omitted.[3] It was concluded by Latham C.J. in *Ffrost* v. *Stevenson* in 1937[4] that the intention was to confer on the mandatory the fullest powers of government. That did not, however imply, the Chief Justice went on, that the Commonwealth exercised sovereignty over its mandated territory. 'The position of a mandatory in relation to a mandated territory must be regarded as *sui generis*. The Treaty of Peace, read as a whole, avoids cession of territory to the mandatory, and in the absence of definite evidence to the contrary, it must, I think, be taken that New Guinea has not become part of the dominions of the Crown.' The title, he concluded, under which the territory was to be held as a Mandated Territory was different from that under which a territory transferred by simple cession would have been held. Neither this case nor that of *Jolley* v. *Mainka*,[5] in which Evatt J. gave utterance to similar views, determined the national status of persons resident in New Guinea at the date of the coming into force of the mandate; nevertheless, the Court in *Wong*'s case drew from the discussions of Latham C.J. and Evatt J. the conclusion that 'Territory the subject of a "C" mandate does not become part of the dominions of the mandatory in such a sense as to confer on the inhabitants the nationality of the mandatory.'[6] The words of Isaacs J. on which the plaintiff relied had, it was held, to be interpreted in the light of the two subsequent cases.

The decision confirms the generally accepted view on nationality in 'C' class

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[1] (1774) 1 Cowp. 204, at p. 208.

[2] *Mainka* v. *Custodian of Expropriated Property* (1924), 34 C.L.R. 297, at p. 300.

[3] See Wright, *Mandates under the League of Nations* (1930), p. 42. The Mandates for Samoa to New Zealand, German South-West Africa to the Union of South Africa, and Nauru to the British Government all referred to the areas in question as 'integral parts' for administration purposes of the territories of the mandatories.

[4] (1937), 58 C.L.R. 528, at p. 550.

[5] (1933), 49 C.L.R. 242, at p. 280.

[6] The New Zealand courts adopted a similar opinion on the question of the sovereignty over Samoa, and although not quoted in *Wong*'s case may be taken as supporting the basis of decision: *Tagaloa* v. *Inspector of Police*, (1927) N.Z.L.R. 883; *In re Tamasese*, (1929) N.Z.L.R. 209; *Nelson* v. *Braisby* (No. 2), (1934) N.Z.L.R. 559.

Mandates.[1] The Council of the League of Nations in 1923, adopting the report of a subcommittee of the Permanent Mandates Commission on the question of nationality in 'B' and 'C' Mandates, resolved that 'the native inhabitants of a mandated territory are not invested with the nationality of the mandatory Power by means of the protection extended to them'.[2] In addition, despite its claims to sovereignty over South-West Africa[3] and judicial confirmation of those claims in the South African courts,[4] the South African Government made no claim that the inhabitants of the Mandated Territory acquired British nationality *ipso facto*. Pursuant to an Agreement with the German Government in 1923, and with the consent of the Council of the League, the South African Government passed legislation in 1924[5] which automatically naturalized adult Europeans resident in South-West Africa who had previously enjoyed German nationality unless they signed a declaration that they were desirous of not being naturalized. The Act did not affect persons who had left the territory before 1924 but after the coming into force of the Mandate. In an unreported case of 1947,[6] the Transvaal Provincial Division of the High Court held that, although South Africa in 1920 acquired sovereignty over South-West Africa, there was no cession of the territory to the Crown, and hence no extension of British nationality to Germans who were in it at the time but subsequently departed. Article 122 of the Treaty of Versailles, which provided for the repatriation of 'German nationals' from the mandated territories, tended, it was held, to repudiate the theory of automatic change of nationality.[7]

If the residents of 'C' Mandates did not acquire British nationality, did they lose their German nationality? On this point there seems to be a fundamental disagreement between judicial decision in South Africa and administrative action of Australia and New Zealand. In 1942 the Union Parliament enacted legislation[8] providing that every person who became a British national exclusively in virtue of the Act of 1924, which has already been mentioned, should henceforth be treated as an alien. In 1946 a Commission was appointed to make recommendations with respect to undesirable aliens. It recommended the deportation of certain persons who had been naturalized under the Act of 1924. It was held[9] on appeal against a deportation order pursuant to this recommendation that residents of South-West Africa had not been deprived of their German nationality in virtue of Article 278[1] of the Treaty of Versailles because that Article had not been incorporated into German municipal law. The apellants had therefore reverted to the status of aliens after 1942. The decision seems to be confirmatory of the assumptions on which both the Union and Germany are alleged to have acted during the negotiations preceding the enactment of 1924. If Germany did not regard the inhabitants of the territory as its nationals in 1924, so it is argued, it is difficult to see why it was referred to at all.[2] The Australian and New Zealand Governments, on the other hand, while proceeding on the assumption that the inhabitants of their mandated territories are not British subjects, have not regarded them as aliens. It has been accepted that persons born in the territories before the Mandates came into force were German nationals under the provisions of the German Nationality Law of 22 July 1913, but that under Section 25 of that Law they lost their nationality upon the dereliction of the territories by Germany. They and their descendants have been treated as lacking nationality but enjoying an administrative status analogous to that of inhabitants of British protectorates.[3] They have been designated in relevant legislation as 'British protected persons',[4] and their passports are specially endorsed for the territory in which they reside. The South African decision is open to the criticism that it examined the relevant provisions of the Treaty of Versailles but not the German legislation, and the assumptions underlying the Australian and New Zealand executive policy seem to be well founded.

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[1] The High Court of Palestine in *Attorney-General* v. *Goralschwili and Another* (*Annual Digest*, 1925–6, Case No. 33), and the Court of Criminal Appeal in England in *The King* v. *Ketter*, [1940] 1 K.B. 787, held that inhabitants of Palestine did not become British subjects on the acceptance of the Mandate. The decisions, while not directly relevant to 'C' Mandates, are based substantially on the premisses in the Australian cases quoted above.

[2] League of Nations, *Official Journal*, 1923, p. 604.

[3] Parl. Pap. Cmd. 2777.

[4] *R.* v. *Christian*, (1924) S.A.L.R. App. D. 101; *Winter* v. *Minister of Defence*, (1940) S.A.L.R. App. D. 194.

[5] Act 30 of 1924; see this *Year Book*, 6 (1925), pp. 188–91.

[6] *Rimpelt* v. *Clarkson*, referred to with approval by Steyn J. in *Westphal and Westphal* v. *Conducting Officer*, (1948) 2 S.A.L.R. 18, at p. 21, reported in *Annual Digest*, 1947, Case No. 12.

[7] In view of the South African decisions on the question of sovereignty over South-West Africa the case may be considered illogical, although satisfactory as to its conclusion. The accepted theory is that inhabitants of territory becoming subject to British sovereignty automatically acquire British nationality: *Campbell* v. *Hall*, 1 Cowp. 204, at p. 208; *Donegani* v. *Donegani*, (1935) 3 Knapp. 63, at p. 85; *Mostyn* v. *Fabrigas*, (1774) 1 Cowp. at p. 171; *Mayor of Lyons* v. *The East India Co.*, (1836) 1 Moo. I.A. 175. If South Africa acquired sovereignty over the territory this conclusion should follow, unless Article 122 constituted an alteration of the Common Law. South Africa, of course, was entitled to refrain from extending British nationality to the inhabitants in question (see *P.C.I.J.*, Series B, No. 4, p. 24), but had not legislated to alter the rule in *Campbell* v. *Hall*.

[8] Act 35 of 1942.

[9] *Minister of the Interior* v. *Bechler et Al.; Beier* v. *Minister of the Interior*, (1948) 3 S.A.L.R. 409 (App. D.) See also *Ex parte Schwietering*, (1948) 3 S.A.L.R. 378. It is to be noted that the

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South African courts are tending away from the full implications of *R.* v. *Christian* in holding that South-West Africa is a foreign country territorially *vis-à-vis* the Union, and that the Union Parliament's legislation only applies on promulgation within the territory: *Faul* v. *South African Railways*, (1949) 1 S.A.L.R. 630 (High Court of South-West Africa), followed in *Van Rooyen* v. *South African Railways*, (1949) 1 S.A.L.R. 640.

[1] 'Germany undertakes to recognize any new nationality which has been or may be acquired by her nationals under the laws of the Allied and Associated Powers and in accordance with the decisions of the competent authorities of these Powers pursuant to naturalization laws or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin.'

[2] Lewis in *Law Quarterly Review*, 39 (1923), p. 471; Emmett in *Journal of Comparative Legislation and International Law*, 9 (1927), p. 117; Oppenheim, op. cit., vol. i (7th ed. by Lauterpacht, 1948), p. 201.

[3] Whose status is discussed in *R.* v. *Earl Crowe, Ex parte Sekgome*, [1910] 2 K.B. 576, esp. *per* Kennedy J. at p. 620; *Sobhuza II* v. *Miller*, [1926] A.C. 518; Evatt J. in *Ffrost* v. *Stevenson*, (1937), 38 C.L.R. 528, at p. 581.

[4] The Immigration Ordinance, 1932–1940, of the Territory of New Guinea accords local officers the power to exclude British nationals from the territory on the assumption that local residents are not British nationals.

CHANGE IN EDITORSHIP

The next number of the *Year Book* will see a change in the Editorship, having regard to the election of the present Editor as one of the Judges of the International Court of Justice. Professor C. H. M. Waldock, C.M.G., O.B.E., Q.C., Chichele Professor of International Law in the University of Oxford, has accepted the invitation to become Editor. It is a pleasure to conclude my work as Editor by extending to Professor Waldock the best wishes of the Editorial Committee and my own.

H. Lauterpacht

DECISIONS OF ENGLISH COURTS DURING 1953–4 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW

State Immunity—Evidence of Interest of Foreign Sovereign State as a Condition of Stay of Proceedings

Case No. 1. *Juan Ysmael and Co. Incorporated* v. *Government of the Republic of Indonesia*, [1955] A.C. 72; [1954] 3 All E.R. 236. From 1951 onwards, the appellants, a company incorporated in the Philippines, chartered a ship to the Government of the Republic of Indonesia under successive charter-parties, the latest of which was due to expire on 30 June 1952. In 1951 negotiations for the sale of the ship were started between *S*, as agent of the appellants, and *P*, as agent for the respondents. The respondents wished to deduct the money due under the charter-party expiring on 30 June 1952 from the purchase price of the ship, but the appellants would not agree to this, and so informed *S*. Nevertheless, *S* and *P* entered into an agreement to sell the ship, and moneys due under the charter-party were deducted from the purchase price. The sale was completed by a bill of sale dated 17 March 1952 and, as from this date, the Government of Indonesia claimed to be the owners of the ship, which by this time had been brought to Hong Kong for repair. On 27 June 1952 the appellants issued a writ *in rem* against the ship and claimed to have legal possession of the ship decreed to them. The Government of Indonesia entered appearance under protest and gave notice of motion for an order that the writ and all subsequent proceedings be set aside on the grounds that the writ impleaded a foreign sovereign State, and that the Government of Indonesia were the owners, or were in possession or control, or entitled to possession, of the ship. Sitting in the Supreme Court of Hong Kong (Admiralty Jurisdiction), Reece J. dismissed the respondents' motion and decreed possession of the vessel to the appellants. This judgment was, however, reversed by the Court of Appeal of Hong Kong. The appellants thereupon appealed to the Judicial Committee of the Privy Council.

It was *held* by the Judicial Committee (Earl Jowitt, Lord Porter, Lord Oaksey, Sir John Beaumont, and Mr. L. M. D. de Silva) that the appeal must be allowed. The rule was that stated by Lord Atkin in *The Cristina*,[1] namely, that 'the courts of a country will not implead a foreign sovereign' and that 'they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control'. The question which arose in this case concerned the second branch of the rule. In the words of the Board: 'Where the foreign sovereign state is directly impleaded the writ will be set aside, but where the foreign sovereign state is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is, therefore, indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed. Plainly, if the foreign government is required as a condition of obtaining immunity to prove its title to the property in question, the immunity ceases to be of any practical effect.' In *The Jupiter*,[2] in which the Court of Appeal set aside a writ *in rem* issued against a ship which was alleged by the Soviet Chargé d'Affaires in Great Britain to be the property of the Soviet Union, Scutton L.J. said: 'I am content to rest my decision in this case on the fact that this writ requires a foreign sovereign to appear in these Courts to defend what he alleges to be his property, and by the principles of international comity the Courts of this kingdom do not allow such steps to be taken against foreign sovereigns.' However, in *The Cristina*, Lord Maugham expressed the view—with which Lord Wright appeared to agree—that, except in the case of 'ships of war or other notoriously public vessels, or other public property belonging to the state', the mere claim by a Government or an ambassador or by one of his servants that the *res* concerned was the property of a foreign State would not be sufficient to bar the jurisdiction of the Court.[1] Lord Maugham even went so far as to say that 'the property in the goods and chattels would have to be established if necessary in our Courts before the immunity could be claimed'—a statement difficult to reconcile with the words of the Board quoted above. Lord Maugham's view also raises other difficult issues, such as what is a 'notoriously public vessel' and what is the meaning of the expression 'other public property belonging to the state'? Nevertheless, this view was apparently accepted by the Court of Appeal in *Haile Selassie* v. *Cable and Wireless, Ltd.*[2] Also, although in the much discussed case of *The Arantzazu Mendi*[3] the decision to set aside the writ depended upon the fact that the Nationalist Government was taken to have proved that it was in possession of the vessel, Goddard L.C.J. in the Court of Appeal expressly agreed with the view that, where a claim for immunity is made by a foreign sovereign, it is not enough that this claim should be a bare assertion of right. As for the more recent *Dollfus Mieg*[4] case, the Board thought that the House of Lords had taken into consideration the evidence relating to the claim of the foreign Governments concerned, since most of the learned Lords had expressed the view that there should have been more adequate discovery of it. The Board proceeded to hold that the view of Scrutton L.J. in *The Jupiter* was 'against the weight of authority' and to state the correct principle as follows:

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[1] [1938] A.C. 485 at p. 490. See this *Year Book*, 19 (1938), p. 243.

[2] [1924] P. 236 at p. 244. See this *Year Book*, 7 (1926), p. 219.

> 'A foreign government claiming that its interest in property will be affected by the judgment in an action as to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title, manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.'

The above passage has been quoted in full because it is likely to become as important on this aspect of the question of sovereign immunity as Lord Atkin's statement of the general rule in *The Cristina*. There is no point in denying the novelty of the principle as now stated, because the Board found it necessary expressly to overrule the judgment of Scrutton L.J. in *The Jupiter*. It also in effect overruled Lord Maugham's rather extreme view. Time alone will show whether the principle now laid down is sound, but at first sight the principle seems a reasonable compromise between the view of Scrutton L.J., which was unduly lenient to the foreign Government, and the view of Lord Maugham, which seems to have erred in the opposite direction.

On the facts of this particular case the Board held that the Government of Indonesia had not possessed such an interest in the ship as would show that they were indirectly impleaded. It found that, after the expiry of the charter-party, the Government of Indonesia had no interest in the ship except such as arose under the alleged sale. The title set up on the basis of this sale was 'manifestly defective', since (i) *S* was without authority to sell on the conditions under which he purported to sell, (ii) *P* knew this, and (iii) even if the Government of Indonesia did not know this, *P*'s knowledge must be attributed to them. Since the respondents had no title, various steps taken by them to implement their alleged title, such as registering the vessel on the Indonesian register, were without relevance. The decisive fact, however, seems to have been that, though the Government of Indonesia purported to dismiss the captain of the ship, their Lordships were satisfied that he had remained the servant of the appellants and that 'legal possession of the vessel never passed to the government of Indonesia'. There is, therefore, no ground for assuming that this decision, as compared with earlier decisions, is generally restrictive of the immunities of foreign sovereign States or that it has done more than clarify one small aspect of the law relating to these immunities, namely, the extent to which a foreign sovereign State claiming an interest in property must produce evidence of that interest before becoming entitled to immunity.

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[1] [1938] A.C. 516.

[2] [1938] Ch. 839. See this *Year Book*, 20 (1939), p. 154.

[3] [1939] P. 37 and [1939] A.C. 256. See this *Year Book*, 20 (1939), p. 151.

[4] [1952] A.C. 582; [1952] 1 All E.R. 572. See this *Year Book*, 29 (1952), p. 458.

Jurisdiction—Foreign Confiscatory Decrees—Dissolution of Foreign Companies

Case No. 2. *Re Banque des Marchands de Moscou* (*Koupetschesky*), [1954] 2 All E.R. 746. The affairs of the *Banque des Marchands de Moscou* have previously been before the English courts.[1] The Bank, which carried on business in Russia but had no branch in England, was dissolved by Russian decrees during the period 1917–18. At this time it had a current account, which was in credit, with the Midland Bank, Limited, in London. In 1932 Eve J. made an order to wind up the Bank under Section 338 of the Companies Act, 1929, and the liquidator got in substantial assets. A Russian named Ouchkoff, who was domiciled in France, lodged a proof in the liquidation, and after his death his claim was presented by his wife as his personal representative. She also was a Russian domiciled in France. The claim was in respect of debts of £10,000 and £2,000 alleged to be owed by the Bank to Ouchkoff in 1917. (The debts appear to have arisen as a result of a deposit of gold by Ouchkoff in a Russian branch of the Bank with a view to obtaining payment of sterling from the Midland Bank, Limited, in London after his escape from Russia.)

It was *held* by Roxburgh J. that the whole transaction was illegal as being a transaction carried out in Russia in breach of the currency legislation of the Provisional Government in power in Russia at the time. Quite apart from that, 'the situs of the alleged debt was in Russia, and the consequence is that it was destroyed at the moment of the dissolution of the Russian bank in Russia if not before'. Thus Roxburgh J. followed substantially the decision of Vaisey J. in 1952, and refused to accept the argument that, if it was the intention of the parties that the creditor was to be paid out of assets in England, this mere intention would suffice to turn a debt situate in Russia into a debt situate in England such as would entitle the creditor to be paid out of the English assets. In the course of his judgment Roxburgh J. expressed in two sentences what may perhaps be taken as the last word on the long line of Russian bank cases:

> 'If a debt was locally situate in Russia at the material date, then the dissolution of the Russian bank removed it altogether from the category of debts and liabilities provable, because it was not a debt at all at the time when the proof was sought to be admitted. But, if the debt was not locally situate in Russia, then the decrees have no extra-territorial operation and, accordingly, whatever may have happened in Russia, the debt remains provable in an English liquidation.'

Jurisdiction—Enforcement of Affiliation Orders against Members of Foreign Armed Forces

Case No. 3. *R.* v. *Birkenhead Borough Justices, Ex parte Smith*, [1954] 1 All E.R. 503. On 15 January 1953 the applicant was delivered of a bastard child. On 17 April Birkenhead justices made an affiliation order in her favour against one Warren, a serving member of the United States Armed Forces. By July Warren was in arrears and was summoned to appear before the justices. He failed to attend, and the applicant applied for a warrant for his arrest. The justices refused the application on two occasions and advised the applicant to apply for an order of mandamus directing them to issue a warrant of commitment.

It was *held* by the Queen's Bench Division (Lord Goddard C.J., Cassels and Slade JJ.) that the justices had no power to issue a warrant. The matter was governed by the United States of America (Visiting Forces) Order, 1942, paragraph 2 (3) (*b*) of which provides that '. . . any enactment . . . which . . . in virtue of a connection with the home forces or any of them, confers a privilege or immunity on any person . . . shall, with any necessary modifications, apply in relation to an American force as it would apply in relation to a home force of a like nature to the American force'. Section 145 (1) of the Army Act makes it clear that, for the purpose of enforcing an affiliation order, execution may not issue against the person or pay of a soldier of the British home forces. Therefore, said Lord Goddard, 'it would seem to follow that, if a court in this country are asked to make an order which can only result in the commitment of an American soldier, they would be right in refusing to do so'. Lord Goddard also said *obiter* that the American authorities were under no duty to make deductions from the soldier's pay. However, if Warren returned to England as a civilian, the applicant could then take proceedings against him. Lord Goddard concluded with the observation that: 'It is some satisfaction to hear from the Attorney-General that this matter is engaging the attention of Her Majesty's government and it may be that some reciprocal arrangement will be made, under which there will be some prospect of affiliation orders being enforced against those who are or have been American soldiers, but we cannot speculate on that.'

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[1] See the decision of Vaisey J., commented upon in this *Year Book*, 29 (1952), p. 460.

It is now, however, possible to state that, under the Visiting Forces Act, 1952, which came into force on 12 June 1954,[1] affiliation orders made against members of visiting forces to which the Act applies[2] are enforceable against them in the United Kingdom by the normal processes of the law, including, in the last resort, committal to prison. The immunity from arrest and imprisonment for failure to comply with maintenance and affiliation orders which is conferred by legislation (e.g. Section 145 of the Army Act) on members of home forces has not been extended to members of visiting forces by the Visiting Forces (Application of Law) Order, 1954, made under Section 8 of the Visiting Forces Act. But there is still no way in which affiliation orders can be enforced against a member of a visiting force who has left the United Kingdom. As stated by Mr. Nutting in the House of Commons on 19 March 1954,[3] 'Once he has left this country he is in exactly the same position . . . as any other foreigner or, for that matter, any other British subject who goes abroad and defaults on an affiliation order.' In the absence of any international agreement providing for the reciprocal enforcement of affiliation orders, enforcement abroad of an affiliation order made in the United Kingdom is impossible, and in the case of the United States forces, the United States service authorities have had no power since 1950 to take disciplinary action where a United States service man refuses to comply with an affiliation order.[4]

Treaties—Operation in the Municipal Sphere—Methods of Interpretation—Conformity of National Legislation with Treaty Obligations—Patents—Compulsory Licence—Effect of International Convention for the Protection of Industrial Property, 1934

Case No. 4. *Parke, Davis and Co.* v. *Comptroller-General of Patents, Designs and Trade Marks and Others*, [1954] A.C. 321; [1954] 1 All E.R. 671. This case turned on the interpretation of Article 5 (A) of the International Convention for the Protection of Industrial Property of 2 June 1934,[5] which reads as follows:

> '1. The importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail revocation of the patent.
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> 2. Nevertheless each of the countries of the Union shall have the right to take the necessary legislative measures to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

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[1] The Visiting Forces Act, 1952 (Commencement) Order, 1954.

[2] The Visiting Forces (Designation) Order, 1954, designates Belgium, France, the Netherlands, Norway, and the United States of America as countries to which the Act applies, in addition to the Commonwealth countries designated in Section 1 (1) thereof.

[3] *Hansard*, 19 March 1954, col. 848.

[4] Ibid., col. 847.

[5] *Treaty Series*, No. 55 (1938).

3. These measures shall not provide for the revocation of the patent unless the grant of compulsory licences is insufficient to prevent such abuses.

4. In any case, an application for the grant of a compulsory licence may not be made before the expiration of three years from the date of the issue of the patent, and this licence may only be granted if the patentee is unable to justify himself by legitimate reasons. No proceedings for the revocation of a patent may be instituted before the expiration of two years from the date of the granting of the first compulsory licence.

5. The foregoing provisions shall be applicable, *mutatis mutandis*, to utility models.'

The appellants, a company registered in the United States of America, obtained a grant of three British letters patent concerning a process for the production of a non-toxic antibiotic (chloromycetin). Within three years of the date of the grant, the second respondents, British Drug Houses, Limited, applied to the Comptroller-General of Patents, Designs and Trade Marks for a compulsory licence under Section 41 (1) (*b*) of the Patents Act, 1949, which provides that, where a patent is in force in respect of a process for producing food or medicines, the Comptroller shall, on application made to him by any person interested, grant a licence on such terms as he thinks fit, unless it appears to him that there are good reasons for refusing the application. The appellants applied for an order prohibiting the Comptroller-General from entertaining the application. The order was refused by the Queen's Bench Division[1] and by the Court of Appeal.[2] On appeal to the House of Lords (Lord Simonds L.C., Lord Oaksey, Lord Morton of Henryton, Lord Asquith of Bishopstone, and Lord Cohen) it was *held* that the appeal must be dismissed. The appeal was based on paragraph 4 of Article 5 (A) of the 1934 Convention, it being argued that no compulsory licence in respect of the patents should be granted before the expiration of three years from the date of the issue of the patent. Reference was also made to Section 45 (3) of the Patents Act, 1949, which provides that no order shall be made in pursuance of any application under Sections 37–42 of the Act 'which would be at variance with any treaty, convention. arrangement or engagement applying to the United Kingdom and any convention country'. But in Lord Cohen's view (and their Lordships generally agreed with Lord Cohen's judgment), Section 41, while forming part of a group of Sections (37–45) dealing with compulsory licences and revocation of patents, was in a special category in that the right to a compulsory licence arose, not by reason of the patentee's exercise or non-exercise of his monopoly, but solely on account of the character of the invention (i.e. food and medicines). It contained no restriction on the time at which the application could be made. Consequently, according to Lord Cohen, paragraph 4 of Article 5 (A) of the 1934 Convention did not apply to licences granted under Section 41. The Article was concerned essentially with abuses of patent rights and not with the special cases of food and medicines. This point was made with characteristic clarity by the late Lord Asquith who, after referring to the fact that the opening paragraphs of the Article dealt expressly with abuses, continued as follows: 'The fourth, the application of which is mainly in question, is, I think, also quite clearly so limited. The words "In any case" with which this paragraph opens have been much relied on by the appellants, as imparting generality of application to the paragraph. But, in my view, having regard to the last three paragraphs, it is to be read as applying to situations *ejusdem generis* with those to which the earlier paragraphs apply, namely, cases founded on "abuse".' Their Lordships felt able to arrive at this interpretation of the Article without considering the history of English patent legislation, Lord Cohen in particular saying that it was unnecessary 'to reach a conclusion as to how far it is permissible to have recourse to the history of the English legislation in order to construe the provisions of the convention'. He thought, however, that that history would lead to the same conclusion. 'Whenever', he said, 'the British government was party to a convention of this kind, it took steps at once to make such amendments in its patent legislation as it thought necessary to give effect to its obligations under the convention.' Yet neither in the Patents etc. (International Conventions) Act, 1938, nor in the Patents Act, 1949, was there any express reference to a time limitation in regard to compulsory licences under patents covering food and medicine.

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[1] [1953] 1 All E.R. 862.

[2] [1953] 2 Q.B. 48; [1953] 2 All E.R. 137.

So far as international law is concerned the chief interest of the case lies in the approach of the House of Lords, and of the courts below, to the problem of treaty interpretation. English canons of interpretation are employed, although there is no reason to suppose that they are materially different from those employed by international tribunals. English legislation is examined as evidence of the intention of the parties to the Convention, of whom the United Kingdom was one, but essentially the Convention is interpreted on its merits. There is every indication that, unless expressly provided, English legislation is presumed to be in accordance with the country's international obligations, and the provision in the Act of 1949 that no order should be made 'which would be at variance with any treaty, convention, arrangement or engagement applying to the United Kingdom' seems to have been treated as declaratory of a general rule and as merely inserted *ex abundanti cautela* in an Act bearing upon a field much regulated by international agreement.

Extradition—Principle of Non-Extradition of Persons Accused of Offences of a Political Character

Case No. 5. *R.* v. *Governor of Brixton Prison, Ex parte Kolczynski and Others*, [1955] 1 All E.R. 31. See the Note on pp. 430–6, *supra.*

War—Effect on Contracts—Trading with the Enemy

Case No. 6. *Arab Bank, Ltd.* v. *Barclays Bank* (*Dominion, Colonial and Overseas*), [1954] A.C. 495; [1954] 2 All E.R. 226. The earlier stages of this important case have already been reported.[1] The appellants were a company incorporated in Palestine in 1930. Their head office was in Jerusalem until 1 July 1948, after which date it was moved to Amman, Jordan. The respondents were a company incorporated in England. In 1939 the appellants opened an account with the respondents' Jerusalem branch. On 14–15 May 1948, upon the termination of the British mandate, war broke out between the newly formed State of Israel and the Arabs in Palestine, supported by neighbouring Arab States. Israel enacted legislation rendering it illegal to make any payment to, or place any sum to the credit of, any person resident outside Israel, and requiring any person having in his possession any property of an absentee to deliver such property to a Custodian of Absentee Property. In compliance with this legislation the respondents paid to the Custodian the amount of the appellants' credit balance. The appellants commenced an action in the High Court of England for the payment of the sterling equivalent of their credit balance, contending:

(i) that their contract with the respondents was wholly abrogated by the outbreak of war;
(ii) that the abrogation extended to the credit balance; and
(iii) that the cancellation of the credit balance gave rise to a right in the appellants to recover from the respondents in London, the respondents' chief place of residence, a sum equal to the credit balance, as money had and received by the respondents for a consideration which had wholly failed.

Parker J. dismissed the claim and his decision was confirmed by the Court of Appeal (Singleton, Jenkins, and Morris L.JJ.), all three judges of which associated themselves with the statement of Lord Thankerton in *Schering, Ltd.* v. *Stockholms Enskilda Bank Aktiebolag*,[2] where he said he was 'inclined to agree with Sir Arnold McNair's suggestion [*Legal Effects of War* (1944), 2nd ed., at p. 93)], that the distinction between "executed" and "executory contracts" may not be very helpful in this connexion, and that it may be safer to say that the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war.' The Arab Bank, Ltd., appealed against this decision.

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[1] See this *Year Book*, 30 (1953), p. 515, where a more complete account of the background of the case is given.

[2] [1946] A.C. 219; [1946] 1 All E.R. 36, at p. 41.

It was *held* by the House of Lords (Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone, and Lord Cohen) that the appeal must be dismissed. It was admitted that the law of Israel in regard to trading with the enemy was the same as the common law of England. The leading authority was *Ertel Bieber and Co.* v. *Rio Tinto Co.*,[1] where Lord Dunedin, after saying that 'a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require . . . commercial intercourse between the one contracting party, subject to the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country', proceeded to qualify this rule as follows: 'There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended.' The issue, therefore, was whether the right of the appellants to their credit balance was an 'accrued right' or not. The appellants contended that it was not, but their Lordships held that it was, mostly referring to the *Schering* case, where it was decided in the case of a debt incurred in favour of a Swedish bank by the English subsidiary of a German company and payable by instalments, some of which were not yet payable when war broke out, that the right to payment of these instalments was not abrogated. Lord Tucker, however, referred to wider grounds of public policy. After admitting that in general the relationship between banker and customer requires a formal demand by the customer before his rights crystallize into a cause of action, he asked: 'What is there in the requirements of public policy that necessitates a distinction being drawn between the case where the customer has made formal demand a moment before the outbreak of war and one where he has not gone through this formality?' In his view, the effect of admitting such a formal test as the basis of a distinction between rights affected by the outbreak of war and 'accrued rights' not so affected might be 'to sanction a very thinly disguised form of confiscation'.

War—Effect on Contracts—Trading with the Enemy

Case No. 7. *Maerkle and Another* v. *British and Continental Fur Co., Ltd.*; *Maerkle* v. *British and Continental Fur Co., Ltd.*, [1954] 3 All E.R. 50. In 1939 the plaintiffs carried on business in Leipzig, Germany, and the defendants, their London agents, bought lambskins on behalf of the plaintiffs. None of the skins had been delivered to the plaintiffs when war broke out in September 1939, although full payment had been made to the defendants. In 1948 the defendants rendered to the plaintiffs a statement of account purporting to show that the proceeds of sale of the skins had been paid to the Canadian Custodian of Enemy Property. In their statement of claim the plaintiffs claimed that the skins were shown as having been sold for $C. 59,000, whereas the true price was $C. 79,000. The plaintiffs claimed (*a*) an account of the sales effected by the defendants, (*b*) payment to the Canadian Custodian of Enemy Property or the United Kingdom Custodian of Enemy Property for and on behalf of the plaintiffs of such sum as was found due, (*c*) damages for breach of trust, (*d*) damages for breach of the contract of bailment, (*e*) damages in conversion, and (*f*) a declaration that the defendants had not truly accounted to the Canadian Custodian of Enemy Property in respect of the sale of the skins, or that the defendants had converted the proceeds of sale to their own use.

Wynn-Parry J., having examined the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, found that the effect of this legislation was that all moneys from time to time held by the defendants on behalf of the plaintiffs were liable to be paid to the Custodian, that a vesting order could be made as regards any property for the time being held by the defendants on behalf of the plaintiffs, and that they were under a duty to give full information to the Custodian regarding all such moneys and property. Clearly, therefore, the only person who could give the defendants a good discharge was the Custodian. Wynn-Parry J. next examined the Trading with the Enemy (Custodian) (No. 2) Order, 1945, and found that the result of that Order was that the whole of the right, title and interest of the plaintiffs in any moneys for the time being held by the defendants on their behalf vested in the Custodian. Nevertheless, he thought that 'Up to this point it may well be argued that the rights of the plaintiffs in the property, the subject-matter of the respective transactions, were merely suspended; and it may well be that if the legislation had gone no further, the observation of Lord Finlay L.C. in *Hugh Stevenson and Sons* v. *Akt. für Cartonnagen Industrie*[1] would have applied, viz.: "It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime." ' But it was necessary also to take into account the Distribution of German Enemy Property Act, 1949, the effect of which, according to Sir Raymond Evershed M.R. in *R. J. Reuter Co., Ltd.* v. *Ferd. Mulhens*,[2] was that it was plain that the arrangements to be made at the conclusion of peace with Germany 'would not comprehend the return to German nationals of property formerly belonging to them. . . .'. Under the Trading with the Enemy (Custodian) Order, 1951, for instance, it was provided that the beneficial interest of any enemy or enemy subject in any property belonging to or held or managed on behalf of an enemy or an enemy subject should vest in the Custodian, although it was also provided that the Custodian could transfer any property vested in him by the Order to or for the benefit of the person who would have been entitled thereto but for the trading with the enemy legislation. Wynn-Parry J. found, therefore, that the plaintiffs had ceased to have any interest in the property which was the subject-matter of the transactions referred to in the statement of claim, and that their interest consisted only of a right to participate in any distribution which the Custodian might make. Since the plaintiffs could not obtain any order for the payment of any sums to themselves, he would not allow the actions to proceed. It would be wrong to allow the actions to proceed with a view to orders being made for payment of any sums by the defendants to the Custodian, because the Custodian had full power to take proceedings in his own name, if he thought fit, and it was his duty (to the exclusion of the plaintiffs) to swell the funds at his disposal by pursuing any rights which the plaintiffs had against the defendants. The plaintiffs appealed to the Court of Appeal (Jenkins and Hodson L.JJ.), arguing (i) that the sums claimed were in the nature of damages for tort and were not assignable under the statutory provisions, and (ii) that, even if their rights were vested in the Custodian, they were nevertheless entitled to a declaration in their favour.

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[1] [1918] A.C. 260.

It was *held* by the Court of Appeal that the appeal must be dismissed. 'It may be', admitted Jenkins L.J., 'that there are claims in tort of certain kinds the rights of action in respect of which would not vest in the custodian'. But the rights in question here were essentially proprietary in their origin and therefore clearly caught by the legislation. Moreover, it would not be right to allow the action to proceed merely in the hope that, if successful, it might increase the prospect of the plaintiffs ultimately participating in any surplus that the Custodian might have on hand after all prior claims had been disposed of.

Enemy Property—Status of the Custodian of Enemy Property—Whether a Servant of the Crown—Immunity from Taxation

Case No. 8. *Bank Voor Handel en Scheepvaart, N.V.* v. *Administrator of Hungarian*

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[1] [1918] A.C. 244.

[2] [1954] Ch. 50; [1953] 2 All E.R. 1160. See this *Year Book*, 30 (1953), p. 517.

Property, [1954] A.C. 584; [1954] 1 All E.R. 969. This case has already been discussed twice in this *Year Book*,[1] so that it is not necessary to give more than a bare outline of the facts. The plaintiffs, a Dutch Bank in which a substantial number of shares were held by a Hungarian national, were the owners of gold deposited in London. In 1940 the gold was transferred to the Custodian of Enemy Property under the Trading with the Enemy Act, 1939. Later in that year the Custodian sold the gold and retained the proceeds, together with the balances due to the plaintiffs from certain banks in London. In 1950 he transferred the proceeds and the balances to the Administrator of Hungarian Property. In the first action Devlin J. gave judgment for the Custodian against the Bank and judgment for the Bank against the Administrator for the sum claimed and interest thereon at 4 per cent. Devlin J. later determined the amount due at £2,224,367. 6*s*. 11*d*. and not at £2,148,041. 8*s*., as contended by the Administrator, the difference of £76,325. 18*s*. 11*d*. being income tax paid by the Custodian in respect of profits made from the purchase by the Custodian of Treasury Bills at a discount, while the money was in his hands. Devlin J. thus upheld the plaintiff's claim that the Custodian, as a servant of the Crown, was exempt from tax and should not have paid it. The Administrator successfully appealed to the Court of Appeal. The Bank thereupon appealed to the House of Lords.

It was *held* by the House of Lords (Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone, and Lord Keith of Avonholm) that the decision of the Court of Appeal must be reversed. As Lord Reid observed, the first issue was a straightforward one. Unless the Bank could show that the Custodian was a Crown servant or a person *in consimili casu* with a Crown servant, the appeal must fail. He commented that it was peculiar that the Attorney-General, by appearing on behalf of the Administrator, should be seeking to limit the application of the Royal prerogative. Lord Reid thought that 'the question whether the custodian is a servant of the Crown depends on the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties'. Under the Trading with the Enemy legislation the Custodian did not appear to have the 'substantial independent discretion' sufficient to take his office out of the category of Crown servants. Lord Reid next dealt with the argument that, even if the Custodian was a Crown servant, he was not entitled to immunity from tax in respect of income that was not 'Crown income'. He agreed that possibly 'a Crown servant could not claim Crown immunity in respect of his performance of statutory duties which served no Crown purpose at all', but he could not accept the argument that Crown immunity could only be claimed if it was required to protect some direct or financial interest of the Crown. In *Austrian Property Administrator* v. *Russian Bank for Foreign Trade*[2] it had been held that the Administrator was entitled to plead Crown immunity from the Statute of Limitations even though the money which he received from collecting debts due to Austrian nationals was not to go to the Crown. In *Re Munster*[3] it had been held by Russell J. that, while enemy property was vested in the Custodian during the war, the beneficial ownership of such property was in 'statutory suspense or abeyance'. It was true that the Crown also had no beneficial right to this property, but the provision in Section 7 (1) of the Trading with the Enemy Act, 1939, to the effect that enemy property was to be preserved 'in contemplation of arrangements to be made at the conclusion of peace' could hardly be taken to limit the Crown to making arrangements which would ensure that every item of property in the hands of the Custodian was returned to its former owner. There was no obligation, in the case of enemy subjects, to return all property to its former owner. And if that was the position, then there was a sufficient 'Crown purpose' in the income to render it immune from tax. Lord Tucker and Lord Asquith agreed substantially with Lord Reid. Lord Morton and Lord Keith dissented, principally on the ground that the income in question was not 'Crown income'. Lord Morton agreed, however, that the Custodian is a Crown servant though 'of a most unusual kind', but Lord Keith was not prepared to say that he was anything more than a 'statutory official'.

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[1] 28 (1951), p. 397, and 29 (1952), p. 471.

[2] (1932), 48 T.L.R. 37.

[3] [1920] 1 Ch. 268.

As was pointed out previously,[1] the question of the status of the Custodian of Enemy Property is not one of international law at all, even though it may be of considerable incidental interest. But the question of the legal status of property vested in the Custodian raises issues of international law of the greatest importance. Their Lordships, however, felt unable fully to develop their views on these issues because leave to appeal to the House of Lords had been granted in the case of *R. J. Reuter Co., Ltd.* v. *Ferd. Mulhens,*[2] in which many of the same issues were raised.

D. H. N. Johnson

B. Private International Law

Divorce—Jurisdiction—Meaning of 'ordinarily resident' in England—Matrimonial Causes Act, 1950, s. 18 (1) (b).

Case No. 1. Prior to the case of *Stransky* v. *Stransky*, [1954] 3 W.L.R. 123, the courts had on only one occasion[3] been confronted with the task of interpreting the meaning of the expression 'ordinarily resident' in relation to s. 18 (1) (*b*) of the Matrimonial Causes Act, 1950.[4] Consequently, the decision in *Stransky* v. *Stransky* will be of some interest to practitioners who are called upon to advise their clients on the extent to which, in any particular circumstances, the English courts will exercise their statutory jurisdiction under this subsection to entertain divorce proceedings by a wife where the husband is not domiciled in England.

The wife petitioner, a British subject, who had married a Czechoslovak in 1944, presented a petition for divorce on the ground of adultery in July 1953. At the time of the marriage the husband was living in exile as his country was then under German occupation. In the summer of 1945 the parties went to Prague, where they lived until early 1948, when both were compelled to leave Czechoslovakia for political reasons. They then returned to London where they eventually took an unfurnished flat. In late 1950 the husband obtained employment in Munich, where he was joined by the wife in January 1951. Apart from three short visits to England, the wife remained in Munich with her husband, living in furnished accommodation, until October 1952, when, the husband having meanwhile left for New York, she returned to London. Throughout this period the wife kept her unfurnished flat in London ready for occupation, and she in fact, returned there in October 1952, and continued to live there until the time of the hearing of her petition.

Karminski J. first considered whether the facts outlined above were sufficient to support the assertion that the husband was domiciled in England at the time of presentation of the petition. He found as a fact that the husband had a Czechoslovak domicil of origin, and, relying on the test laid down by Lord Macnaghten in *Winans* v. *Attorney-General*[5] that what must be proved is a fixed and settled purpose to abandon the domicil of origin and acquire a new domicil, held on the evidence that the husband had formed no such clear intention, and had therefore not acquired a domicil of choice in England.

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[1] See this *Year Book*, 29 (1952), p. 473.

[2] [1954] Ch. 50; [1953] 2 All E.R. 1160. See this *Year Book*, 30 (1953), p. 517.

[3] *Hopkins* v. *Hopkins*, [1951] P. 116; noted in this *Year Book*, 27 (1950), pp. 470–1. This case was of course strictly concerned with the interpretation of s. 1 (1) (*a*) of the Law Reform (Miscellaneous Provisions) Act, 1949, now re-enacted as s. 18 (1) (*b*) of the Matrimonial Causes Act, 1950.

[4] 14 Geo. V, c. 25; this subsection provides that the High Court shall have jurisdiction to entertain divorce or nullity proceedings by a wife, notwithstanding that the husband is not domiciled in England, 'if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man'.

[5] [1904] A.C. 287.

Consequently, the learned Judge was faced with the task of determining whether the Court might still have jurisdiction by virtue of the wife's having been 'ordinarily resident' in England for the statutory period of three years prior to the commencement of the proceedings, notwithstanding the admitted fact that for fifteen months of that period she was living in Munich. He found some guidance as to the meaning of 'ordinarily resident' from consideration of various cases under the Income Tax Acts. In particular, it had been emphasized that 'resident' was essentially a quality or attribute of the person and was not descriptive of his property.[1] 'Ordinary residence' as compared with 'residence' imported an element of continuity, apart from occasional or temporary absences.[2]

Hopkins v. *Hopkins*, which was the only direct precedent for an interpretation of 'ordinary residence' in relation to divorce jurisdiction, was distinguishable on the facts, for, in that case, the wife had during a five months' period when she had lived in Canada, given up her English home altogether; consequently, Karminski J. found himself in full agreement with the decision in *Hopkins* v. *Hopkins* that the wife had not been 'ordinarily resident' in England for the statutory period.

The critical question, according to Karminski J., was to discover where the wife had her real home throughout the whole of the statutory period. Relying on the fact that, in spite of her absences abroad, the wife retained her flat in London and kept it ready for occupation, and on the consideration that her presence in Munich for long periods was accidental in the sense that it was dictated by the exigencies of her husband's work, the learned Judge declared himself satisfied that the wife had been ordinarily resident in England for the statutory period, and therefore *held* that the Court had jurisdiction to dissolve the marriage.

This decision is, on the whole, to be welcomed. While it is no doubt well to remember that to determine whether someone is 'ordinarily resident' in a particular place necessitates an inquiry into the hopes, fears, purposes, and intentions of that particular person, considerable assistance to the inquiry can be given by showing that the person concerned does maintain a home in that particular place despite frequent trips abroad. In other words, the personal and subjective test of 'ordinary residence' must, in the nature of things, be influenced by certain objective criteria, such as the maintenance by the person whose 'residence' is in question of an establishment within the country where 'ordinary residence' is alleged.

Divorce—Foreign Decree—Jurisdiction of Foreign Court—Recognition of Decree by English Court

Case No. 2. It was only to be expected that the broad principle established by the Court of Appeal in *Travers* v. *Holley*,[3] whereby recognition in England was accorded to a foreign divorce decree pronounced by a court other than the court of the domicil on the basis that the circumstances in which the foreign court had exercised jurisdiction were substantially the same as those in which an English court would exercise jurisdiction where the parties were not domiciled in England, would give rise to further litigation tending to define more closely the scope and purpose of the new rule. In *Dunne* v. *Saban*, [1954] 3 W.L.R. 980, Davies J. was afforded an opportunity of considering the new rule and determining whether it should be applied to a set of circumstances differing in some material respects from those which gave rise to the earlier case.

The parties were married in England in 1950 and shortly thereafter emigrated to the United States of America where the husband obtained employment in Florida. In late

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[1] *Pickles* v. *Foulsham*, [1923] 2 K.B. 413, *per* Rowlatt J.; *Inland Revenue Commissioners* v. *Lysaght*, [1928] A.C. 234 at p. 244, *per* Lord Sumner.

[2] *Levene* v. *Inland Revenue Commissioners*, [1928] A.C. 217, at p. 225.

[3] [1953] 3 W.L.R. 507; noted in this *Year Book*, 30 (1953), pp. 527–30.

1952 the husband returned alone to England, intending to reside here permanently. On this evidence, the Court was satisfied that the husband, whose domicil of origin was in England, had acquired a domicil of choice in Florida in 1951, but had abandoned it and reverted to his domicil of origin when he returned to England. In 1953 the wife, who had refused to return to England with the husband, instituted divorce proceedings in the Florida courts and obtained a decree of divorce on the ground of cruelty. The jurisdiction of the Florida Court was predicated on the circumstance that the wife petitioner was a 'resident' of Florida and had been an 'actual bona fide resident' for more than 90 days before the filing of the bill of complaint. The husband now petitioned the English courts for a declaration that his marriage in England had been validly dissolved by the Florida decree.

Davies J., after determining that the Court had jurisdiction to entertain a petition of this nature by virtue of the recent decision of the Court of Appeal in *Har-Shefi* v. *Har-Shefi*,[1] referred to the old authorities establishing the principle that the only court which can validly dissolve a marriage is the court of the domicil[2] and the principle that by English law the domicil of the wife follows that of the husband to the extent that she cannot have a domicil different from that of the husband.[3] The argument advanced by the petitioner was that these fundamental principles had been relaxed as a result of the various statutory exceptions introduced into English law since 1937 permitting the courts to dissolve marriages in cases where the wife is resident in this country although the husband is not domiciled here, and that consequently English law must recognize the right of a foreign country to exercise jurisdiction where the wife is resident there even if the husband is domiciled elsewhere.

Davies J. considered this argument in the light of the principle established in *Travers* v. *Holley*, but found it unconvincing. To his mind the observations of the Court of Appeal in that case were directed to a case where the extraordinary statutory jurisdiction of the foreign court corresponded almost exactly with the extraordinary statutory jurisdiction exercisable by the English courts. Here, however, the jurisdiction of the Florida Court was founded upon fulfilment of the two jurisdictional requirements of the law in force in Florida, namely, (*a*) 'residence' of the complainant, which in this context could be taken to mean domicil,[4] since Florida, like most American States, recognized the right of a wife to establish a domicil separate from that of her husband, and (*b*) 'actual bona fide residence' of the complainant within the jurisdiction for more than 90 days before the filing of the bill of complaint. The circumstances in which the foreign Court had exercised jurisdiction bore no relation to the circumstances in which English courts could exercise their extraordinary statutory jurisdiction:

> 'In my judgment the observations in *Travers* v. *Holley* merely decide that this court will recognize the right of other courts to encroach upon the principle of domicile only to the extent to which this court does also. Where, as here, you find a court purporting, no doubt completely properly according to the laws of Florida, to exercise jurisdiction upon 90 days' residence, even though that is coupled with something that we do not recognize, namely, a separate domicile of the wife in the United States, the only possible answer which this court can give is to say that the decree of that foreign court was in our law invalid.'[5]

The decision is welcome in that it does constitute an attempt to restrict within reasonable bounds the rules laid down in *Travers* v. *Holley*. Nevertheless, one feels that, if the learned Judge had had more time to consider his judgment,[1] he might have indicated rather more clearly the basis of his objection to recognition of the Florida decree. The jurisdictional requirements of the Florida Court unquestionably differed from those of an English court exercising its statutory jurisdiction, and it would appear that this was the decisive consideration; nevertheless, on the facts, the wife had not been 'ordinarily resident' (in the English sense) in Florida for a period of three years prior to the commencement of the Florida proceedings, so that, even on the facts, as distinct from the comparative jurisdictional requirements, she could not be regarded as having in substance satisfied the English requirement of three years' ordinary residence.[2]

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[1] [1952] 2 All E.R. 821 (Barnard J.); [1953] 1 All E.R. 783 (C.A.); noted in this *Year Book*, 30 (1953), pp. 524–7.

[2] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517.

[3] *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146; *Attorney-General for Alberta* v. *Cook*, [1926] A.C. 444.

[4] Domicil, of course, in the sense attributed to the word in Florida.

[5] [1954] 3 W.L.R. 980, at p. 989.

This case may not therefore finally dispose of the suggestion made by Griswold,[3] in relation to his proposal that 'the recognition rule applied by a court should follow, and indeed be a reflection of, its jurisdictional rule',[4] that 'it makes no difference whether the statutory provision proceeds in terms of residence or in terms of the deserted wife retaining a separate domicile; it is the factual situation which is important'.[5] Nevertheless, it is clear that the tendency of this decision is to confine the principle established in *Travers* v. *Holley* to cases in which the encroachment by the foreign Court upon the domicil principle in asserting jurisdiction does not exceed the corresponding encroachment by the English courts.

Succession—Adoption—Right of Foreign Adopted Child to Succeed on English Intestacy

Case No. 3. There is no field of English private international law in which the authorities are so scanty as that of the recognition of foreign adoption orders. The case of *In re Wilson*, [1954] 2 W.L.R. 1097, may therefore assume a significance out of proportion to the rather limited nature of the *ratio decidendi*, and may be cited in support of propositions not yet fully established in English law. Nevertheless, the decision is to be welcomed if only for the reason that it does serve to draw attention to the rather unsatisfactory state of English law in this matter of recognition of foreign adoptions.

The facts of this case were that a husband and wife (*H* and *W*), who were British subjects domiciled in England, obtained an adoption order from a Quebec court in respect of an infant (*A*) born in Montreal. In 1946 the marriage was dissolved, both parties ultimately marrying again. In 1947 *H* made a will whereby he left the bulk of his property to his second wife, and in 1953 both he and she were killed in an air accident; as she was the elder of the two, she was presumed, by virtue of s. 184 of the Law of Property Act, 1925, to have pre-deceased him, it being quite uncertain which of them in fact survived the other. Consequently, *H* had to be regarded as dying intestate, and the question which Vaisey J. was called upon to decide was whether *A* could succeed to *H*'s personal estate.

Vaisey J. *held*:

(*a*) that the question whether an adopted child can succeed to property as the child of an adopter dying intestate is to be determined by the *lex successionis*, and not by the law governing the adoption;

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[1] The case, having come on for hearing as an undefended petition on 20 October 1954, was adjourned until 15 November 1954 to enable argument to be presented to the Court on behalf of the Queen's Proctor; judgment was delivered the following day, as the learned Judge was due to go away on circuit.

[2] S. 18 (1) (*b*), Matrimonial Causes Act, 1950.

[3] *Harvard Law Review*, 65 (1951), p. 193, at pp. 226–31.

[4] Ibid. p. 227.

[5] Ibid., p. 228. It has been pointed out in support of this proposition that an English court will recognize a decree pronounced by the courts of the domicil of the parties, notwithstanding that the courts of the domicil may have purported to exercise jurisdiction on grounds other than domicil; *L.J.*, vol. 105, p. 179. This is, of course, a cogent point, but, as the reason for the disregard by the English courts of the grounds on which the courts of the domicil have purported to exercise jurisdiction is the basic principle that the law of the domicil is alone competent to determine whether or not a change of status has been effected, it is doubtful whether it can properly be invoked in support of a theory advocating an exception to that basic principle.

(*b*) that an adoption effected under a foreign jurisdiction, at least where the adopters were not domiciled within that jurisdiction at the time of the adoption, cannot give to the adopted person rights under the English law of intestacy;

(*c*) that consequently the infant in this particular case could not succeed to *H*'s property.

Little fault can be found with the decision as such. This was clearly a case where recognition could not be accorded in England to the creation of the status of adoption itself, as distinct from recognition of the rights attaching to that status. There is almost unanimous agreement among writers that a foreign adoption will not be recognized in England unless it is valid according to the *lex domicilii* of both the adopter and the child.[1] Here the adoption was not valid according to the *lex domicilii* of the adopter, so no question of recognition of the status should have arisen. However, Vaisey J. appeared to think that for some purposes, e.g. for an order for custody on the divorce of the adoptive parents, the adoptive status might be recognized in England. Whether this be so or not, there can be no doubt that, for all normal purposes, recognition should not be accorded in England to an adoption not valid according to the *lex domicilii* of both parties.

Vaisey J. was at pains to point out the distinction in principle between the status of adoption and the status of legitimation. Adoption is an artificial relationship created by the law, and imposing differing obligations on the adopter according to the provisions of the particular law under which it is created; legitimation, on the other hand, is a fairly general jurisprudential concept, the effect of which is to assimilate the status of the legitimated person to that of a person legitimate by birth. He was consequently not prepared to apply uncritically the principles established in *In re Goodman's Trusts*[2] to the effect that a child legitimated according to the law of the father's domicil at the time of the birth and the time of the subsequent marriage was entitled to a share in the personal estate of an intestate as one of the next of kin.[3] It is hardly necessary to venture into the doctrinal controversy concerning the distinction between status and its incidents,[4] for Vaisey J.'s judgment indicates clearly the reasons why, even if that distinction were not accepted generally, it would have to be accepted in relation to recognition of foreign adoptions. There is no clearly defined and generally recognized body of rights and duties constituting the status of adoption in comparative jurisprudence; consequently, a foreign adoption may not even approximate in its effects to an English adoption, and it might be inequitable to regard a foreign adoption, creating a much looser relation between adopter and child than does an English adoption, as equivalent to an English adoption for succession purposes. Nevertheless, there is implicit in Vaisey J.'s judgment a lurking uncertainty as to what would have been the position had the status of adoption created in Quebec been such as to command recognition in England. It is submitted that the result would have been the same, if only for the limited reasons outlined above.

Succession—Legitimacy—Domicil of Parents at Birth of Child—Polygamous Marriage

Case No. 4. It is interesting to contrast the restrictive attitude adopted by Vaisey J. in *In re Wilson*[5] in relation to the right of a foreign adopted child to succeed on an English intestacy with the broader principles to which expression was given by the Judicial

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[1] Cheshire, *Private International Law* (4th ed.), p. 402; Wolff, *Private International Law* (2nd ed.), p. 401; Dicey, *Conflict of Laws* (6th ed.), p. 511.

[2] (1881), 17 Ch. D. 266.

[3] *In re Goodman's Trusts* has been severely criticized on the ground that it destroyed the distinction, in relation to legitimation, between recognition of a status and recognition of the incidents of that status, in that the question before the Court was classified as one of status rather than as one of construction of an English statute; see, in particular, Welsh in *Law Quarterly Review*, 63 (1947), pp. 75-79.

[4] For a brief analysis of this distinction see Graveson, *Conflict of Laws*, 2nd ed., pp. 92-98.

[5] See *supra.*, p. 474.

Committee of the Privy Council in the case of *Bamgbose* v. *Daniel*, [1954] 3 W.L.R. 561, in relation to the somewhat analogous issue of the right of children of a polygamous marriage celebrated abroad to succeed on an intestacy governed by English law.

The deceased, who was the child of a marriage contracted under the Marriage Ordinance, 1884, of the Colony of Lagos, died domiciled in Nigeria and intestate. The Ordinance provided that, where any person issue of such a marriage died intestate subsequently to the commencement of the Ordinance, his disposable estate should be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding. The deceased was said to have entered into nine polygamous marriages in Nigeria in accordance with native law and custom, and no question of his capacity to do so by the local law arose. The appellant claimed, as lawful nephew of the deceased, to succeed to the whole of the estate, while the twelve respondents argued that he should be excluded as they were all legitimate children of the deceased born in Nigeria of the polygamous marriages.

The respondents contended that by the law of their domicil of origin they were legitimate children of the deceased and consequently came within the class of persons entitled to succeed under the English Statute of Distributions, 1670, which was the relevant law of England in 1884. Their Lordships accepted the view that if the respondents were legitimate children of the deceased by Nigerian law, which was the law of their domicil of origin, they should not be excluded from taking their rights of succession. Reference was made to *In re Don's Estate*[1] and *In re Goodman's Trusts*[2] as establishing the principle that the legitimacy or illegitimacy of an individual is to be determined by the law of his domicil of origin. While accepting that this principle had hitherto been applied only in cases dealing with the institution of monogamous marriage, their Lordships saw no reason why it should not be applied to cases where the marriage in question was a polygamous marriage. Their Lordships cited the opinion of Lord Maugham in the *Sinha Peerage*[3] case and the judgment of Lord Greene M.R. in *Baindail* v. *Baindail*[4] as evidence that valid polygamous marriages will be recognized for many purposes in England.

In reply to the argument advanced by the appellants that the Statute of Distributions could not be applied to polygamous unions because of the difficulty of applying its provisions to a plurality of wives, their Lordships were content to point out that in this particular case no such difficulty arose:

> 'The West African Court of Appeal observed that no claim had been put forward in this case by any person as a widow of the deceased, and their Lordships propose to say nothing as to what rights, if any, widows would have in the event of a claim being made. They cannot, however, agree with the appellants' submission. Whatever difficulties may arise in the case of the mothers of the children, the claims of the children as lawful children of the deceased must, in their Lordships' opinion, be considered independently.'[5]

The decision in this case is, it is submitted, sound. It carries one stage further the rule established in *In re Goodman's Trusts* and *In re Bischoffsheim*[6] to the effect that the question of legitimacy is to be tested by the law of the domicil of origin of the person concerned by applying that rule to issue of a polygamous union. The case is therefore confirmation of the *dicta* expressed by Lord Penzance in *Hyde* v. *Hyde*[7] and by Chitty J. in *Re Ullee*[8]

[1] (1857), 4 Drew. 194.

[2] (1881), 17 Ch. D. 266.

[3] (1939), 171 House of Lords Journals 350: [1946] 1 All E.R. 348 (n.).

[4] [1946] P. 122; noted in this *Year Book*, 24 (1947), p. 422.

[5] [1954] 3 W.L.R. 561, at p. 568.

[6] [1948] Ch. 79; noted in this *Year Book*, 25 (1948), pp. 428–9.

[7] 'This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions'; (1866), L.R. 1 P. & D. 130, at p. 138.

[8] (1885), 53 L.T.R. (N.S.) 711.

suggesting that it might be possible to concede rights of succession to children born of a valid polygamous union. Although no reference was made in their Lordships' judgment to the case of *In re Bethell*,[1] the decision in this case must be taken to provide confirmation of the view expressed by many writers[2] that the true explanation of the non-recognition of the polygamous marriage in *In re Bethell* lies in the fact that the male party, being domiciled in England, had no capacity under his personal law to contract a polygamous marriage.

Despite the fact that the principle established in *Bamgbose* v. *Daniel* seems at first sight to be inconsistent with the decision in *In re Wilson*,[3] it is submitted that the two cases are reconcilable on the grounds that the status of legitimacy or legitimation is a status whose incidents, in general, vary little from country to country, while the status of adoption is a status whose incidents fluctuate widely in different countries.

Contract—Charter-party—Goods Shipped at French Port on Italian Vessel—Proper Law

Case No. 5. In the last issue of this *Year Book*,[4] the present writer reviewed and commended the decision of Willmer J. in *The Assunzione*.[5] From this decision directing that Italian law was the proper law of the contract, the French charterers have since appealed to the Court of Appeal, which dismissed the appeal.[6]

It is unnecessary to recapitulate the complicated facts of the case, and the arguments advanced in the Court of Appeal did not differ materially from those put forward in the lower Court. The plaintiff charterers contended that the proper law of the contract was French law, relying principally on the consideration that the charter-party was made in Paris in support of their argument that the presumption in favour of the *lex loci contractus* should be applied. The Italian shipowners asserted that Italian law was applicable, basing their claim on the principle that, as regards contracts of affreightment, the law to be applied should be the law of the flag.

Singleton L.J. was not able to derive any firm conclusion from an exhaustive consideration of the authorities which had been cited to him in argument. The duty of the Court, in circumstances such as those where the parties had not expressed in their agreement what law they intended should govern the contract, was 'to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract'.[7] In his opinion, it was necessary to look at all the circumstances surrounding the contract, particularly where, as in this case, one of the circumstances, if taken by itself, would tend to support one presumption, and another circumstance, if taken by itself, would tend to support another presumption. Weighing all the facts, he considered that the scale came down in favour of the application of Italian law.

Birkett L.J. commented on certain subsidiary arguments advanced on behalf of the charterers, analysed the facts put forward by each side to support its own contention and concluded that, on balance, the indications were that it was Italian law which should be reasonably supposed to have been in the minds of the parties as the law which should govern the contract.

Hodson L.J. adopted a rather different line of approach. He accepted that the duty of the Court was to impute an intention to the parties, but he did not altogether agree with

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[1] (1888), 38 Ch.D. 220.

[2] See Beckett in *Law Quarterly Review*, vol. 48, p. 347; Fitzpatrick in *Journal of Comparative Legislation* (2nd series), vol. 2, p. 379; Dicey, op. cit., p. 227; Cheshire, op. cit., pp. 288–9.

[3] See *supra*, p. 474.

[4] Vol. 30 (1953), pp. 534–5.

[5] [1953] 1 W.L.R. 929.

[6] [1954] 2 W.L.R. 234.

[7] Lord Wright in *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*, [1938] A.C. 224, at p. 240; noted in this *Year Book*, 19 (1938), pp. 256–7.

Willmer J. in doubting whether the flag of the ship, or even the nationality of the ship, raised anything in the nature of a presumption.[1] In his opinion, the authority of *Lloyd* v. *Guibert*,[2] despite the criticism which had been directed against it,[3] could not be denied. He concluded, therefore, that, in the final analysis, when the evidence is so evenly balanced that the Court cannot otherwise reach a fair and just conclusion, the presumption in favour of the law of the flag can be applied.

The decision does not purport to offer any solution to the perennial controversy between the 'subjectivists' and the 'objectivists', i.e. between those who contend that the function of the judge is to ascertain what law the parties would have chosen had their attention been directed to the point and those who contend that the function of the judge is to ascertain with what law the contract has the most real or substantive connexion. It cannot be denied that the 'subjectivists' will take heart from the reasoning of the Court and the nominal approval by the three Judges of the 'presumed intention' test. Nevertheless, the 'objectivists' can fairly point out that the decision was in fact based on an analysis of certain objective criteria; no other course was open to the Court since, as Birkett L.J. was at pains to point out, each party strenuously maintained that in no circumstances would it ever have agreed to accept the law of the other country as the proper law of the contract had any thought been given to the question. This brings out the essential difficulty of the 'presumed intention' doctrine, where the facts negative the existence of any common intention at all.

Choses in Action—Situs—*Applicability of Proper Law or* lex situs—*Israeli Absentee Property Legislation—Extra-territorial Effect.*

Case No. 6. The case of *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139, is worthy of attention for the light it throws on the vexed questions of the law applicable to the transfer of a chose in action and of the rules determining where a chose in action is properly situate. The case in addition raised a number of interesting side issues relating to proof of foreign law and the confiscatory nature of foreign enemy property legislation.

In an interpleader action, the plaintiffs and the defendant put forward rival claims to a sum of approximately £5,000, admittedly due under a policy of insurance. The policy had been taken out by the plaintiffs on 21 November 1947, and had been issued by an English insurance company through their agents in Haifa, the plaintiffs being at that time admittedly resident in a part of Palestine which is now in the State of Israel. By the policy, the company agreed to cover the plaintiffs against loss in respect of a garage owned by them at Haifa; in January 1948, the garage was blown up as a result of riots, the loss being covered by the policy. Two months later the plaintiffs left Haifa and went to Egypt, where they have resided ever since.

In May 1948 the British Mandate in Palestine was terminated and the State of Israel was proclaimed. In December 1948 the Israeli Minister of Finance made emergency regulations appointing a Custodian of Absentee Properties and directing every person to deliver up to the Custodian any property of an absentee which was under his control and, if such property was a liability towards the Custodian, to discharge the liability to the Custodian. 'Property' within the meaning of the regulations included movables, money, and a right to property, and 'absentee' was defined as any person who was the lawful owner of any property in the area of the regulations and who on and after November 1947 was in, *inter alia*, Egypt. In 1950 an Absentee Property Law, which was in substantially the same terms as the Regulations and which provided that it should be read as one with the Regulations, was enacted in Israel.

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[1] [1953] 1 W.L.R. 937.

[2] (1865), L.R. 1 Q.B. 115.

[3] Two main criticisms were in the course of argument directed against the rule laid down in *Lloyd* v. *Guibert:* (*a*) that the case arose out of the authority of the master to act when in a foreign port in circumstances of distress; and (*b*) that it was inconsistent with a later *dictum* of Lindley L.J. in *Chartered Mercantile Bank of India, London & China* v. *The Netherlands Co., Ltd.* (1883), L.R. 10 Q.B.D. 521, to the effect that the *lex loci contractus* ought to prevail. Hodson L.J. disposed of the first criticism by maintaining that the actual decision in *Lloyd* v. *Guibert* was given upon a contract of affreightment, and of the second by arguing that the *dictum* of Lindley L.J., if read in its context, is not inconsistent with the rule laid down in *Lloyd* v. *Guibert*, since, in the case which Lindley L.J. was deciding, there was no reality about the Dutch nationality of the ship, despite the fact that she flew the Dutch flag.

For the defendant, it was contended:—

(*a*) that the proper law of the contract was that of Palestine until the termination of the Mandate and thereafter that of Israel; and

(*b*) that the *situs* of any debt payable by the insurers was the part of Palestine which was now Israel and that therefore, as the plaintiffs were at all material times 'absentees' within the meaning of the Regulations and the Law, the sum due under the policy was vested in the defendant by virtue of those Regulations and the Law.

Pearson J. *held*:

(1) that an insurance claim is a claim for unliquidated damages, and, as such, a chose in action;

(2) that a chose in action is situate where it is properly recoverable, i.e. where the debtor resides; that where a corporation resides in two or more countries, the chose in action is properly recoverable in the country where it is primarily payable; and that, on the facts of this case, the company, through its agents, was resident in Haifa until 31 December 1949, and that Palestine was the primary place of payment according to the ordinary course of business; and that consequently the chose in action was situate in Haifa up to 31 December 1949;

(3) that the proper law of the contract was that of Palestine until the termination of the Mandate and thereafter that of Israel;

(4) that the chose in action in this case was movable property, rather than an unperformed obligation under the contract;

(5) that, accordingly, it was the *lex situs*, rather than the proper law of the contract, which governed any question of transfer of title to the chose in action;

(6) that the chose in action was a 'movable' within the meaning of the Regulations and the Law, and was therefore 'property' to which that legislation applied;

(7) that the Law should be construed so as to apply only to property situated in Israel, and if the defendant had to show that the chose in action was caught *de novo* by the Law, he would fail, since it was not proved that the chose in action was situate in Israel after 31 December 1949; but that the Law merely continued, with some slight amendments, the régime established by the Regulations;

(8) that the chose in action had become vested in the defendant by virtue of the Regulations and remained vested in him notwithstanding its subsequent removal to another country;

(9) that neither the Regulations nor the Law were confiscatory, since they were analogous to English legislation relating to enemy property.

From this brief summary it will be readily apparent that the case involved consideration of a number of problems which have given rise to controversy in the field of Conflict of Laws. In the first place, it is evident that Pearson J. accepted the principle that the *lex situs*, rather than the proper law, governs the question of transfer of title to a chose in action. He distinguished the cases cited in support of the contrary proposition by arguing that *Perry* v. *Equitable Life Assurance Society of the United States of America*[1] was a case in which no chose in action had actually arisen since the contract of insurance was annulled in 1919 and no payment became due under the policy until 1923, by asserting that *Rex* v. *International Trustee*[2] only showed that the obligation under a bond could

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[1] (1929), 45 T.L.R. 468; noted in this *Year Book*, 11 (1930), pp. 234–5.

[2] [1937] A.C. 500; noted in this *Year Book*, 18 (1937), pp. 212–15.

before its maturity[1] be altered by legislation of the country of the proper law, and by pointing out that *Kahler* v. *Midland Bank*[2] was not really relevant as the owner in that case had never had a right to take immediate possession of the securities in England.

As the decision in this case depended so clearly on the *situs* of the chose in action, it is interesting to observe that Pearson J. was satisfied, on the authority of *Princess Paley Olga* v. *Weisz*,[3] that if the chose in action had become vested in the defendant by virtue of the Regulations, the transfer of title thus effected would continue to be recognized in England notwithstanding a subsequent change in the *situs* of the chose in action. It is submitted that this view is but a logical extension of the principle established in respect of tangible movables to the effect that foreign legislation, even if confiscatory, transferring title to property situate within the foreign country will be recognized in England,[4] even if the property subsequently comes within the jurisdiction of the English courts. It may be conceded that the notion of a *lex situs* for intangible movables is an artificial concept, and that the *situs* may indeed be different for one purpose from what it is for another.[5] Nevertheless, if it is accepted that for this particular purpose, namely, the realization and enforcement of the chose in action, the question was governed by the *lex situs*, there is no reason why a transfer of title effected by the *lex situs* in respect of that chose in action, while the latter was unquestionably situate there, should not continue to be recognized in foreign countries despite a subsequent change in the *situs* of the chose in action.

It has been suggested[6] that the case could more conveniently have been decided on the basis that Israeli law was the *lex loci solutionis* of the original insurance contract, and that the cases of *Ralli Bros.* v. *Compañia Naviera*[7] and *Frankman* v. *Anglo-Prague Creditbank*[8] show that English courts will give attention to provisions of the *lex loci solutionis* which affect the discharge of a contractual obligation which has matured. There is much to be said in favour of this view, though there may be a question as to how far the principle established in the earlier cases can be applied where the legislation of the place of performance is concerned primarily with property rather than contract.

In conclusion, it may be remarked that Pearson J. considered himself competent, on the authority of *In re Cohn*,[9] to interpret the Israeli legislation without the benefit of expert oral evidence. He also found that the Israeli legislation was not confiscatory in character, relying explicitly on the authority of *In re Munster*[10] and impliedly on the consideration that, as the legislation was analogous to English enemy property legislation, the principle of reciprocity would demand that recognition should not be refused to it on the grounds of public policy.

Contract—Order by Foreign Court directing Cancellation of Rights under English Contract—Enforceability in England

Case No. 7. In a previous issue of this *Year Book*,[11] the interlocutory proceedings in the case of *British Nylon Spinners* v. *Imperial Chemical Industries Ltd.*[12] were briefly reported. It will be recalled that the Court of Appeal at that stage granted an injunction restraining the defendants from reassigning, in obedience to an order of an American

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[1] Italics supplied.

[2] [1950] A.C. 24; noted in this *Year Book*, 25 (1948), p. 434, and ibid., 26 (1949), pp. 487–8.

[3] [1929] 1 K.B. 718; noted in this *Year Book*, 11 (1930), pp. 233–4.

[4] *Luther* v. *Sagor*, [1921] 3 K.B. 532.

[5] Wolff, *Private International Law* (2nd ed.), pp. 542–3.

[6] Thomas in *International and Comparative Law Quarterly*, 3 (1954), p. 497.

[7] [1920] 1 K.B. 614.

[8] [1948] 1 K.B. 730; an appeal was taken to the House of Lords, where the case is reported as *Zivnostenska Banka National Co.* v. *Frankman*, [1950] A.C. 57. The decision has been noted in this *Year Book*, 25 (1948), pp. 432–4, and ibid., 26 (1949), pp. 485–7.

[9] [1945] 1 Ch. 5; noted in this *Year Book*, 22 (1945), p. 292.

[10] [1920] 1 Ch. 268.

[11] Vol. 29 (1952), pp. 485–6.

[12] [1952] 2 All E.R. 780.

Court, certain patents which were the subject of a contract with the plaintiffs entered into in England and to be performed in England.

The action having come on for hearing,[1] Danckwerts J. was called upon to determine whether specific performance of the English contract, whereby the defendant company agreed to grant exclusive licences to the plaintiff company in respect of certain patents and applications for patents previously assigned to the defendant company by an American company, should be granted to the plaintiff company, notwithstanding that the defendant company had, subsequent to the making of the English contract, been ordered by an American Court to reassign the patents within a specified period.

The strict legal issue before the Court was relatively simple to decide. It was clear that the plaintiff company was not a party to the American proceedings; it was equally evident that the contract between the plaintiff company and the defendant company was one exclusively governed by English law, since it was a contract made in England between two English companies, the performance of which would be accomplished wholly within England. Consequently, there was no room for the extra-territorial operation of the American anti-trust laws, and the order of the American Court, in so far as it purported to affect the contractual relations between the plaintiff company and the defendant company—relations which were governed exclusively by English law—could not be enforced in England.[2]

The interest of this judgment lies not so much in the actual substance of the decision (with which few would wish to quarrel) as in the careful manner in which the learned Judge analysed the American proceedings with a view to discovering the extent to which the American Judge had considered his order would be effective in England. While Danckwerts J. felt no doubt about the principle which he considered himself bound to apply, he was anxious to establish that his judgment implied no disrespect towards the American Court. To this end, he cited several passages from the judgment of the American Court to show that the American Judge was far from certain that the English courts would accept the validity of his order, and recognized that certain provisions in that order would be entirely without effect unless they were enforced by an English court; he also had the advantage of expert evidence from a member of the Bar of the State of New York to the effect that, if the defendant company, though prohibited from doing so by a judgment of an American court, complied with an order of an English court having jurisdiction to enforce the contract and executed a licence, this would not be treated by the American court as a contempt of Court. Consequently, Danckwerts J. was of opinion that the judgment which he was bound to deliver in favour of the plaintiff company would not disturb the comity which the courts of the United States and the courts of England are so careful to observe.

I. M. SINCLAIR

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[1] [1954] 3 W.L.R. 505.

[2] In support of this view, Danckwerts J. cited the case of *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 K.B. 678, where the Court of Appeal gave judgment against a Hungarian bank on a claim by London bankers to recover a sum of money from the Hungarian bank, notwithstanding that Hungarian law made it illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Bank, on the basis that the proper law of the contract and the *lex loci solutionis* were English law.

REVIEWS OF BOOKS

Annuaire de l'Institut de Droit International. 2 volumes. Basle: Éditions juridiques et sociologiques S.A. 1954. lxxvii+975 pp.

These two volumes contain a report of the proceedings of the forty-sixth Conference of the Institute of International Law held at Aix-en-Provence in April and May 1954, and also of the preparatory work of the various committees which preceded the actual Conference. The Conference adopted four Resolutions, relating, respectively, to the amendment of the Statute of the International Court of Justice, the question of domestic jurisdiction, the immunity of foreign States from jurisdiction and measures of execution, and the application of revenue laws. Even though the adoption of Resolutions is far from representing the sum total of the valuable work done by members of the Institute, it may be as well to begin this review with a consideration of the actual Resolutions adopted, and then to consider some of the preparatory work, including that which did not result in the adoption of Resolutions—or even in discussion at Aix—as well as that which did.

The study of possible amendments to be made in the Statute of the International Court of Justice resulted from the Resolution adopted at Siena in 1952. This expressed the hope that 'the election of the members of the Court, being concerned with persons, not with States, should be kept altogether apart from the elections relating to the other organs of the United Nations, and should take place at the nearest possible date to the opening of the Session of the Assembly and immediately after the closure of the general opening debate'. It was also recommended that, while the General Assembly and the Security Council were voting on the election of the judges, 'steps should be taken to prevent any communications passing between them, save only the official announcements made by each body to the other, of the results of their respective electoral meetings'. It was hoped in this way to bring about immediately, and without any need to wait for a revision of the Statute of the Court, a reduction of the influence of political considerations upon the election of the judges. The Institute also, however, established a very strong committee, under the chairmanship of Dr. Huber, to examine the matter further, even to the extent of recommending changes in the Statute of the Court.

The Resolution adopted at Aix proposes that 'without prejudice to the need for maintaining a certain geographical representation within the International Court of Justice, as provided for in Article 9 of the Statute, judges of the Court should be elected primarily on the basis of their personal qualifications in accordance with Article 2' and that 'in the event of the Statute being revised, a clarification covering this point could usefully be added to Article 9'. There has always been a latent conflict between Article 2, which stresses personal qualifications, and Article 9, which in theory stresses 'the representation of the main forms of civilization and of the principal legal systems of the world', but which in practice has been interpreted in the same sense as Article 23 of the Charter where the relevant words are 'equitable geographical distribution'. This conflict has recently grown more acute at a time when the political influence of certain countries has increased out of all proportion to the quantity and quality of persons in those countries who can reasonably be said to be 'jurisconsults of recognized competence in international law'. The Institute has done well to emphasize the overriding importance of Article 2. By declining to make more drastic recommendations it has impliedly endorsed the view—which may be the correct one—that certain difficulties which are known to have arisen recently concerning the composition of the Court are only of a temporary nature. The Resolution also states that, while it is desirable to avoid an increase in the size of the Court, nevertheless 'should new circumstances make some increase necessary, the number of judges should not exceed eighteen'. The 'new circumstances' envisaged are apparently the possibility that certain other Powers might be given permanent seats on the Security Council, or that important countries at present excluded from the United Nations might be admitted as Members, and therefore become '*ipso facto* parties to the Statute'. It would be difficult to imagine any circumstances of a more 'political' nature. It would, therefore, hardly be consistent with the object of the Resolution as a whole to allow that, merely as a result of such circumstances, the composition of the Court should be affected. If the Court is to be increased in size, the case for such an increase should be made on its merits. It is submitted, however, that no such case can seriously be made out and that, if one of the major problems affecting the good governance of the Court is the election of the judges, this problem would be increased rather than diminished by raising the number of judges.

But it is possible to give an unrestrained welcome to certain other proposals contained in the Resolution. These provide that the judges should be elected for a term of fifteen years, instead of nine as at present. There would, however, be an age limit of seventy-five years. The danger of judges being influenced by the desire to secure their own re-election to the Court would be obviated by a provision that they should not be re-eligible. It is also suggested that, 'when several seats are to be filled, successive votes for each seat seem more likely to prevent unexpected results', and it is pointed out that 'this method is not incompatible with the present Statute'. While the intention behind this proposal is no doubt commendable, the phrase 'unexpected results' seems most unsuitable. The Institute can hardly be presumed to have intended that the result of the elections should be a foregone conclusion. The Resolution also states that 'it is a matter of urgency to widen the terms of Article 34 of the Statute so as to grant access to the Court to international organizations of States of which at least a majority are Members of the United Nations or Parties to the Statute of the Court'. It is to be hoped that this recommendation at any rate will command such general support that it will be given effect in the near future. But the Resolution is, unfortunately, equivocal on the issue of *ad hoc* judges, merely stating that, if this system cannot be abandoned, the appointment of *ad hoc* judges should be 'subject to guarantees as nearly as possible equivalent to those governing the election of titular judges'. It is suggested, for instance, that such judges might be appointed by the national group of the Permanent Court of Arbitration of the State concerned rather than by the Government of that State.

Altogether, it is difficult to avoid the impression that the Institute in its recommendations was rather lacking in boldness. It is one thing to say that responsible learned societies in the field of international law should not make utopian suggestions. But it is quite another thing to argue that these societies should confine themselves to recommending changes which are capable of realization in the immediate present. There is no warrant, for instance, in the statutes of the Institute of International Law for adopting so limited a view of the Institute's functions. Moreover, it seems a pity that the Institute felt unable to make any substantial recommendations concerning the jurisdiction of the Court and that more was not heard of the interesting proposal that the General Assembly and the Security Council should establish a small committee of experts to advise them concerning the qualifications of the candidates for election to the Court.

On the question of domestic jurisdiction, the Resolution adopted by the Institute contains many important features. These include the endorsement of the view that, while the *domaine réservé* is 'the domain of State activities where the jurisdiction of the

State is not bound by International Law', nevertheless 'the extent of this domain depends on International Law and varies according to its development'. The Resolution also states that 'the conclusion of an international agreement regarding a matter pertaining to the "reserved domain" precludes a party to the agreement from raising the plea of domestic jurisdiction in respect of any question relating to the interpretation or application of the agreement' and that 'the question whether, in a concrete case, the matter in dispute falls or does not fall within the "reserved domain" is, in the event of controversy, eminently appropriate for decision by an international organ of a jurisdictional character'. Although the drafting of these provisions—particularly in the English text—might have been more elegant, the Institute deserves nothing but praise for approaching this difficult problem in a manner which fully asserts the authority of international law. This is even more apparent from the adoption of a *vœu* expressing 'the hope that States which include in their declarations accepting the compulsory jurisdiction of the International Court of Justice a reservation in respect of matters of domestic jurisdiction will leave it to the Court to decide in each particular case whether the reservation is applicable'. The Institute has also done a service by adopting an article which, in effect, puts the notorious Article 2 (7) of the Charter in its proper place in relation to the problem of domestic jurisdiction as a whole, by pointing out that 'the expression "matters which are essentially within the domestic jurisdiction of States" has been used in order to delimit, in relation to the "reserved domain", the competence of certain international organizations as determined by the constituent instrument of each of these organizations'.

On the question of State immunity, the Resolution adopted by the Institute provides, in Article 1, that 'The courts of a State have no jurisdiction to entertain actions concerning acts of State of a foreign State, or of a juridical person under the authority of a foreign State.' After thus stating the traditional view, the Resolution goes on to provide that a State may waive its immunity in a number of specified ways (Article 2), and in particular, in Article 3, that 'The courts of a State may entertain actions brought against a foreign State and the legal persons mentioned in Article 1 whenever the grounds of the action do not involve an act of State.' The article also provides that 'Whether an act is an "act of State" or not is a question to be determined by the *lex fori*'; whilst according to Article 5, 'No forced execution or provisional attachment may be effected upon property belonging to a foreign State employed for its governmental activity which is not connected with any economic undertaking.' From the point of view of logic these conclusions are inferior both to the previous system of complete immunity and to the bold solution urged by Professor (now Judge) Lauterpacht in the 1951 volume of this *Year Book*. They were, however, adopted by an impressive majority in the Institute, and there is little doubt that they are representative of recent trends in State practice.

The fourth Resolution adopted by the Institute is of relatively little value. It contains but three articles of an original *projet* which was intended to contain twenty articles and which would have attempted to proclaim the general principle that a State's political and revenue laws should have no extra-territorial effect. Not surprisingly, however, it proved impossible to secure a definition of political laws, with the result that the Resolution finally adopted contains the not very original proposition that 'Except as otherwise provided in international conventions, revenue laws have no force outside the State where they have been enacted.' Although care is taken in these days of nationalization to make it clear that 'The claims of a State or of public corporations, notably claims resulting from commercial or industrial activities, shall not be considered as having a fiscal character, even in the case of monopolies', it seems reasonably safe to prophesy that the Institute will be compelled to give more thorough and definitive attention to this question in the years to come.

Meanwhile, the Institute has much interesting work in hand. This includes a consideration of such problems as the exhaustion of local remedies; the distinction between internal and territorial waters; the interpretation of treaties; the drafting of a standard clause for the purpose of giving compulsory jurisdiction to the International Court of Justice in cases where that is desired; the revision of the law of war; and the problem of marriage between persons of different nationality. Some of these questions are too vast to be dealt with by the Institute in the two years which elapse between one meeting and another. Others would perhaps be better left to the International Law Commission. But one question on which it is to be hoped that the Institute will make further progress, since it is well suited to the task, is that being discussed in a strong committee of which M. Wilhelm Wengler is *Rapporteur*. An excellent *projet* put forward by M. Wengler suggests a number of ways in which international bodies could be subjected to judicial control, and it is surely only realistic for international lawyers to begin to tackle a problem which is exercising constitutional and administrative lawyers in so many countries today.

D. H. N. Johnson

European Year Book. Volume I, 1955. Edited by Dr. B. Landheer and Dr. A. H. Robertson. Published under the Auspices of the Council of Europe. The Hague: Martinus Nijhoff. 1955. xxv+584 pp.

It is gratifying to welcome this publication 'devoted to the scientific study of European international organisations, including their constitutions, their functions and their work'. The wide scope of its programme and the excellence of the editorial work amply warrant the hope that it may fulfil in relation to European organization the same task which the *United Nations Year Book* has fulfilled with unvarying success in relation to the United Nations.

This first volume of the *Year Book* consists of three Parts: the first Part includes valuable articles by persons who, each in his own field, can claim to be equipped with special and expert knowledge. Dr. van Kleffens writes on 'Unity and Diversity in Western Europe'; M. Robert Schuman on Europe as a Spiritual and Cultural Community; M. Marchal, Secretary-General of the Council of Europe, on the Council of Europe; Mr. Mallett on 'The History and Structure of the Organization for European Economic Co-operation'; M. Quin on 'A Single Market for Europe'; M. Etzel on the European Coal and Steel Community; M. Cialdea on the European Political Community; M. Modinos on the European Convention on Human Rights; and—last but not least important—Dr. C. W. Jenks on 'World Organisation and European Integration'.

The Documentary Section includes, in addition to other information on the Brussels Treaty Organization, the text of the Brussels Treaty of 1948; the basic texts of the Organization for European Economic Co-operation, such as the principal Convention, the Protocol on Privileges and Immunities, as well as information on official publications of the Organization; the basic texts of the Council of Europe, as well as the Convention on Human Rights; and the basic texts and similar supplementary information on the European Coal and Steel Community, the Northern Council, the European Conference of Ministers of Transport, the European Organization for Nuclear Research, and the European Conference on the Organization of Agricultural Markets.

A novel feature of the extensive bibliography is that it is accompanied by a useful indication of the contents of the works listed. There is, in addition, a selective list of articles and pamphlets.

The present review is no more than an enumeration of the contents of this valuable volume. But it is fitting to pay tribute to the originality of its conception and the thoroughness of its editorship. The *Year Book*, if continued on these lines, will serve as an indispensable instrument for the study of European political and legal organization in its various manifestations. It will also provide, indirectly, a contribution of significance to wider problems of international law and organization.

H. L.

Grotius Society Transactions for the Year 1953. Volume 39. London: The Grotius Society. 1954. xxiii+257 pp. 25*s*.

This volume of the *Transactions* of the Grotius Society contains the proceedings of the International Law Conference held in October 1953 in Gray's Inn; the addresses at the Society's dinner on the occasion of the Conference; papers read before the Society in 1953; and finally the proceedings of a meeting held in the Signet Library in Edinburgh in July 1953. Even for the Grotius Society the various addresses and papers cover an unusually extensive field. An address of extraordinary quality was that given on 'International Law and Colonial Administration' by Baron F. M. Van Asbeck, Professor of International Law and International Political History in the University of Leiden. Bringing to this subject an immense experience, including many years spent as a member of the Permanent Mandates Commission of the League of Nations, Baron Van Asbeck shows that the germs of the idea of colonial administration as a 'sacred trust' can be traced back at least as far as Burke and Wilberforce; and that, so far as his own country is concerned, Queen Wilhelmina in her Speech from the Throne in 1901 emphasized the moral duty which the Netherlands' people had to fulfil with respect to the populations under their rule. From the time of the Berlin Conference of 1885 the colonial territories took their place within the circle of international law, albeit as wards. Before the Second World War, however, international standards of colonial administration were negative rather than positive. They were concerned with the prevention of abuses rather than with progress towards self-government. But Baron Van Asbeck does well to point out that the practice of the colonial Powers, through international consultation and through their membership of such bodies as the International Labour Organization, went far beyond their formal obligations under the Covenant. Coming to the Charter, Baron Van Asbeck distinguishes between the '*national* trusteeship' prescribed by Chapter XI for '*all* overseas territories without any exception' and the '*international* trusteeship' prescribed for territories placed under this form of trusteeship in accordance with the provisions of Chapters XII and XIII. Both these kinds of trusteeship, as the author rightly says, are now duties under international law. The chief difficulties which have arisen concern the scope of the principle of '*national* trusteeship' and the territories to which it is applicable. Contrary to the attitude of some Governments, Baron Van Asbeck contends that 'a marked and insuperable distinction between trust territories and other colonial territories is no longer maintained'. It may be possible to agree with this view. But does not Baron Van Asbeck fall almost instinctively into error when he says that Chapter XI applies to 'overseas territories' rather than to all 'non-autonomous peoples within the metropolitan territory of members of the United Nations'? In so far as the sense of injustice felt by the colonial Powers at the interpretation of Chapter XI by the United Nations has a legitimate basis, it is mainly because their critics have not been prepared to apply the laudable principles of this Chapter to their own peoples, but have sometimes sought to limit the application of these principles to a certain type of territory only. The author's treatment of these difficult and topical questions is, however, a masterpiece of objectivity.

Also in the field of public international law, Professor (now Judge) Lauterpacht contributes a paper entitled 'Some Possible Solutions of the Problem of Reservations to Treaties'. Although the substance of this paper has already appeared in the *Report on the Law of Treaties* submitted by Professor Lauterpacht to the International Law Commission as *Rapporteur* on the subject, it nevertheless constitutes in itself both a lucid diagnosis of a difficult problem as well as a constructive attempt to solve it. Another aspect of treaty law is discussed by Dr. Hambro in a paper entitled 'The Interpretation of Multilateral Treaties by the International Court of Justice'. From this it appears that certain Articles of the Statute and of the Rules of Court (particularly Articles 34 and 63 of the Statute and Article 57 of the Rules) are obscure in their meaning, difficult to apply in practice, and therefore in need of revision.

In an interesting address on 'The Debt of International Law in Britain to the Civil Law and the Civilians', Sir Arnold (now Lord) McNair has no difficulty in showing that a knowledge of the history of international law is almost indispensable to a full understanding of the rules of the modern system. Similarly, Professor Campbell's scholarly paper on 'James Lorimer: A Natural Lawyer of the Nineteenth Century' illustrates the value of continuing to study the works of former exponents of international law, however strange certain aspects of their systems may seem to us.

In a paper entitled 'The Judicial Approach to International Affairs' Mr. Harvey Moore pleads for 'a vast extension of the principle of impartial judgment by disinterested men'. There will be general sympathy with this plea, but Mr. Harvey Moore's specific proposal that there should be 'a revision of the Statute of the International Court of Justice to allow the permanent appointment of non-legal Senators to compose from time to time, with a minority of judges, High Commissions to determine political, as opposed to "justiciable" matters', is unlikely to command support either in legal or in diplomatic circles. If, however, there should still be left any illusions upon the extent to which the judicial approach is applied in international affairs, Professor Reut-Nicolussi's moving paper on 'The International Legal Status of Austria since 1918' should be enough to dispel them.

In the field of private international law, Mr. Alex Donaldson contributes an admirably lucid exposé of 'Some Conflict Rules of Scots Law', while Professor Kahn-Freund's paper on 'Reflections on Public Policy in the English Conflict of Laws' is not only in itself a comprehensive survey of a matter of growing importance but also seems to have stimulated a discussion in which other speakers made useful contributions.

D. H. N. JOHNSON

Halsbury's Laws of England. Third edition, under the general editorship of LORD SIMONDS. Volume 7: Conflict of Laws and Constitutional Law. London: Butterworth & Co. (Publishers), Ltd. 1954. 110+631 pp.

This volume of the well-known and encyclopaedic *Laws of England* contains not only a title dealing with private international law but also, within the title 'Constitutional Law', a section on public international law. The first of the two titles has been contributed by Mr. Justice Wynn Parry, Mr. Hugh F. MacMaster and Mr. John Latey. The title defines its own scope as comprising the rules adopted by the English courts for determining, first, the limits of their own jurisdiction in matters which wholly or in part arise abroad, or in connexion with foreign transactions; secondly, the law, whether English or foreign, which it is in such matters their duty to apply; thirdly, the effect of a foreign judgment in English proceedings; and, fourthly, the reciprocal enforcement of judgments between the United Kingdom and foreign countries. These rules, so far as they can be gathered from the judgments of the courts themselves, are luminously expounded in the text, while criticisms and divergences of opinions among writers are firmly relegated to very brief footnotes. For a practising lawyer this method of presentation is invaluable; he can readily ascertain what, on the basis of previous decisions (or relevant Acts of Parliament), a court is likely to decide on the question posed by his client. If he wishes to go further into the matter and see what arguments are available which may be used to deflect the court from giving such a decision, the footnotes refer him to the relevant parts of the standard writers on the Conflict of Laws—Dicey, Cheshire, and the rest.

Public international law is dealt with in the title 'Constitutional Law' under the heading 'The Crown in Foreign Relations', although reference to it first appears in the second paragraph of the title 'Conflict of Laws', where is briefly discussed the question whether and to what extent the rules of public international law are part of the municipal law of England. The learned editors of this title hold that 'The weight of modern authority regards [customary rules arising from practice and long usage] as part of English law only so far as they have been adopted and made part of the law of England by legislation, judicial decision or established usage'. The title 'Constitutional Law' was contributed by Professor F. H. Lawson, Mr. H. J. Davies and Mr. C. J. Slade. In it a similarly constricted view is taken of international law. In the section on 'The Crown in Foreign Relations' are reviewed the jurisdictional immunities of foreign sovereigns and governments, the classes and privileges of diplomatic persons (with separate reference to representatives of Members of the Commonwealth and the Republic of Ireland, to international organizations and to consular officers), Acts of State, treaties, the United Nations, war and peace, and foreign jurisdiction. Under the heading 'Acts of State' are discussed the Act of State considered as an act of the Executive as a matter of policy performed in the course of its relations with another State, as well as the recognition of official acts of revolutionary governments, including unrecognized revolutionary governments, and also the 'class of facts which are conveniently termed "facts of State" '—matters and questions the determination of which is solely in the hand of the Crown or the Government, facts of which the Court takes judicial notice and for this purpose, in any case of uncertainty, seeks information, which is conclusive, from a Secretary of State. Under the head 'Treaties' there will be found a succinct exposition of both the international and the municipal law regarding treaties. The former is taken largely from *Oppenheim* (7th edition by Lauterpacht). The treatment of the latter reveals the remarkable paucity of authority which exists in English law concerning the construction and enforcement of treaties to which the United Kingdom is a party. The United Nations receives one short paragraph and a footnote relating it to the United Nations Act, 1946. The subsection on War and Peace provides a useful summary of the English law relating to the commencement and termination of war, and that on Foreign Jurisdiction compendiously presents the effect of the Foreign Jurisdiction Act, 1890, and the Orders made under it.

A. B. LYONS

Laws Concerning Nationality. United Nations Legislative Series: New York. 1954. xvii+594 pp. 30*s*.

The draftsmen of the *Harvard Draft Convention on Nationality* observed in 1929 that 'there seem to be no laws which are more fluid and subject to change than nationality laws'. The remark is evidently still true. For of the eighty-four countries whose legislation is reproduced in this volume, only Afghanistan, Cambodia, Chile, China, Honduras, Ireland, Italy, Liechtenstein, Spain, the Vatican City, and Viet-Nam have left their laws untouched since 1939. And with respect to the exceptions, the collection may not be quite up to date. It is indeed explained in the Preface that this may well be the case. But a promise is made to insert additions, as well as corrections, in any later edition. In view of this invitation, it may be pointed out that the material relating to the Commonwealth is deficient in the following respects: Australia—The Nationality and Citizenship Act, 1948, was again amended in 1953 by Act No. 85; Canada—The Canadian Citizenship Act, 1946, was again amended in 1954 by 2 & 3 Eliz. II, c. 34; Ceylon—The Indian and Pakistani Residents (Citizenship) Acts, 1949 and 1950, are relevant; Southern Rhodesia—further amendments were made by Act No. 63 of 1953; United Kingdom—The British Protectorates, &c., Order incorporates by reference the legislation of various protected States, &c., of which at least the following is available: the Federal and State enactments of 1948 relating to citizenship of the Federation of Malaya; the Tonga Constitution, the Tongan Nationality Act, 1935, and the Naturalization Act, 1916 (Tonga); the Bahrein Nationality Law; and the Zanzibar Nationality Decree, 1952. It may further be noted that the Union Citizenship Act, 1948, of Burma is inexplicably omitted although the amending Act of the following year is printed. And the legislation of the U.S.S.R. has an appearance of incompleteness.

This collection follows the method of that issued by Flournoy and Hudson simultaneously with the *Harvard Draft Convention* and of that currently appearing in the series *Documentation Juridique Étrangère* under the auspices of the Belgian Ministry of Foreign Affairs. That is to say, it consists in bare texts, without commentary. It is, perhaps unfortunately, not sufficient to enable the reader to work out from its pages alone even somewhat elementary practical problems. For instance, it will not enable him to decide what is the nationality of a person born in France prior to 1949 of a father who was a British subject at the time of the birth. For all the British Nationality Act, 1948—the only relevant instrument printed—tells him is that the child concerned will be a citizen of the United Kingdom and Colonies provided that he was a British subject immediately before 1 January 1949 and provided further that his father fell within certain defined categories of persons. In order to discover whether the child concerned was a British subject before 1949 the reader must turn to the British Nationality and Status of Aliens Acts, 1914 and 1943, which are not reproduced here. Similarly, if the reader wishes to know the status of a person born in the Philippine Islands prior to 1935 he will not discover the answer here. It would presumably be asking too much to demand that the collection should be extended to comprehend all expired legislation which is still relevant to the determination of the status of persons in being. But the addition of notes such as appeared in Flournoy and Hudson, giving, as it were, the genesis of the contemporary legislation, would be very welcome. Some bibliographical information would also be desirable. In addition, some expansion of the Annexes on Treaties would be welcome. These are not as inclusive as those in Flournoy and Hudson. They include indeed the texts of 'International Conventions on Nationality' (i.e. the Hague Convention and Protocols and the Pan-American Conventions), of the nationality provisions of the Peace Treaties and of some other multipartite instruments. Incidentally, though the Index suggests that the text of the Scandinavian Agreement of 1950 is printed, in fact there is given merely a cross-reference to the *United Nations Treaty Series*. But of bipartite agreements there is a mere list of those which were registered with the League or have been registered with the United Nations. And even this list is not exhaustive, as it does not mention the Franco-Belgian Agreement of 1928 respecting the military service of dual nationals (Flournoy and Hudson, p. 707; *L.N.T.S.*, vol. 123, p. 97; see also *U.N.T.S.*, vol. 93, p. 87), which, incidentally, regulates the nationality of children of diplomats and consuls. Nor does it mention the Costa Rica–Spanish Convention of 1930 (*L.N.T.S.*, vol. 168, p. 61), whose provision that the arrangements therein made for the mutual recognition of military discharges shall in no way affect the nationality of the persons affected is at least as worthy of inclusion as the text of the New Zealand Infants Amendment Act with its provision that adoption shall have no effect upon nationality. The same applies as respects the Franco-Danish Agreement of 1950 (*U.N.T.S.*, vol. 48, p. 115) and the Franco-American Agreement of 1948 (ibid., vol. 67, p. 33). It is not intended, by the way, to imply that this list of omissions is itself exhaustive.

Some twenty years ago Mr. Durward V. Sandifer made on the basis of Flournoy and Hudson an analysis of the nationality laws of the world (see *American Journal of International Law*, vol. 29, pp. 248–78) and reached such conclusions as that twenty-two countries applied the *jus soli* unconditionally, two both the *jus soli* and the *jus sanguinis* unconditionally, seventeen the *jus sanguinis* and the *jus soli* subject to an option on the part of the child of alien parents to reject nationality of the place of birth, seven the *jus sanguinis* exclusively, and so forth. A notable feature of that study was its findings in relation to the nationality of married women, then the topic of the times. If a comparable study were to be made on the basis of this collection, no doubt certain shifts of emphasis would become apparent. It may thus be suggested that it would become clear that the rule of the Hague Convention respecting married women has been adopted on a wide scale. To bring Mr. Sandifer's analysis up to date would involve consideration of the laws of new States which have come into existence, such as Israel, Libya, Indonesia and Burma. It would likewise require an examination of the legislation of entities which, whilst not exactly new entrants upon the international scene, have, as it were, only recently become 'nationality-conscious', such as various of the countries of the Commonwealth, Jordan, Nepal, Korea, Laos, Syria, and Lebanon. Clearly, the task cannot be undertaken upon a mere first reading of this new collection. But even a first reading suggests certain conclusions which a more detailed analysis might be expected to reveal: that the *jus sanguinis* is spreading its sway; that the requirement of five years' residence as a qualification for naturalization, once so hotly contested within the Commonwealth, has now become well-nigh universal; and that the rule that voluntary naturalization in another State works an automatic forfeiture of nationality of origin—a rule now abandoned in the United Kingdom—is more generally admitted than it was a generation ago.

CLIVE PARRY

Repertory of Practice of United Nations Organs. Prepared by the Secretariat of the United Nations. Volume I. Articles 1–22 of the Charter. New York: United Nations Publications. 1955. xi+742 pp. (mimeographed). 25*s*.

This is perhaps the most useful and scholarly publication prepared so far by the Secretariat of the United Nations. While necessarily adhering to an unavoidable—though occasionally artificial and questionable—measure of restraint, it is bold both in its scientific conception and in its practical analysis. When completed it will justifiably claim to fulfil the function not only of an informative guide, but also of a true treatise on the Charter of the United Nations. In both respects it is bound to fulfil amply its dual purpose as indicated by the Secretary-General in his Preface. The first object is, in his words, to facilitate the consideration by the General Assembly, at its tenth annual Session, of the proposal to hold a General Conference of the Members of the United Nations for the purpose of reviewing the Charter, as provided in Article 109. He could rightly have added that any of the future sessions of the General Assembly concerned with this matter, and the Review Conference itself, would greatly benefit from this work. This is probably implied in the second purpose of the *Repertory* as stated by the Secretary-General, namely, to contribute to the knowledge and understanding of the Charter as it has been applied in practice by the organs of the United Nations. The intention is to cover the entire Charter in five volumes, and, it is hoped, to supplement it regularly so as to increase both its scope and its value from year to year.

The *Repertory* is concerned with the practice of the organs of the United Nations, including Advisory Opinions of the International Court of Justice and decisions taken by the Secretariat, with regard to the application and interpretation of the Charter. (It is a moot question whether Judgments of the International Court of Justice in so far as they bear on the interpretation and application of the Charter ought to be included. The Judgment of the Court in the first phase of the *Corfu Channel* case came near to having that effect. It is, of course, arguable—though, perhaps, not conclusively—that in the course of its contentious jurisdiction the Court does not act as an organ of the United Nations.) The *Repertory* is primarily concerned with definite decisions of the organs of the United Nations—'decisions' being defined for that purpose 'as any act of a United Nations organ adopting or rejecting, by vote or otherwise, a proposal in whatever form made' (p. vi).

As the *Repertory* deals only with the practice of organs of the United Nations, it deliberately leaves out of account acts of individual Governments, even when these are of a formal and definite character, such as legislative measures adopted in pursuance of the Charter. This method has—doubtless for good reasons—been interpreted so strictly as to create on occasions the appearance of artificiality. Thus, as a rule, in giving an account of the discussion preceding the adoption of decisions the *Repertory* does not refer *eo nomine* to a particular Government as having made a statement. It says that 'a representative of a Member State' expressed a certain view; it does not say which Member State it was. Obviously it was impossible to adhere to that method throughout. Thus when a definite proposal has been made by a representative of a Government, that Government is named in the *Repertory*. On occasions the Government expressing a view is mentioned by name although no formal proposal has come from it. The reviewer is not prepared to criticize the method thus adopted or the apparent lack of consistency in following it. There may have been good reasons for both. A *Repertory* devoted to an account and analysis of the practice of the organs of the United Nations cannot, without changing its character and becoming unwieldy—quite apart from the necessity of avoiding, in an official publication, an invidious selection from the views expressed by Governments—attempt at the same time to give an account and an analysis of the attitude of the Members of the United Nations towards the interpretation and application of the Charter. This does not mean that a systematic attempt of that kind is unnecessary and that it would not constitute a fitting companion to the *Repertory*. The unquestionable competence with which the present volume has been prepared naturally prompts the hope that the same directing hand and brain which has conceived and executed the *Repertory* of the practice of the organs of the United Nations will also undertake responsibility for a *Repertory* of the practice and attitudes of Members of the United Nations in the same field.

It is not possible within the scope of the present review to give even a summary account of the range covered by the *Repertory* and the method by which its task has been accomplished. By way of example, reference may be made to the Chapter covering—in more than one hundred pages—Article 2 (7) of the Charter (relating to matters of domestic jurisdiction). The Chapter is divided into two main parts. The first part gives an historical survey of the various questions involving the plea of domestic jurisdiction which have come before the General Assembly, the Economic and Social Council, the Security Council and the International Court of Justice—twenty-five cases in all. The survey includes an account of decisions taken in these cases at successive meetings of the organs concerned, and of the discussion which preceded these decisions. The second part is devoted to an analysis of the practice of these organs by reference to the two main component parts of Article 2 (7)—the term 'to intervene' and the crucial phrase 'matters essentially within the domestic jurisdiction of any state'. With regard to the first, the Chapter analyses the practice of organs of the United Nations from the point of view of the question whether there is intervention as the result of the following acts: the inclusion of an item in the agenda; recommendations either of a general character or addressed to an individual State; the request to stay the execution of persons condemned to death; the establishment by the General Assembly of a commission to study certain domestic problems, such as the racial problem in the territory of a Member State; the setting up, for that purpose, of a Commission of Investigation under Article 34 of the Charter; the adoption by the Security Council of a Resolution tendering its good offices to the parties to a dispute or calling upon them to cease hostilities or to settle the dispute by peaceful means. All these questions are surveyed by reference to actual problems which arose before the General Assembly or the Security Council. The survey is accompanied by an analysis of the discussion and the statements made by the representatives of various Governments in the course of the deliberations. The same method is pursued with regard to the second determinant phrase of Article 2 (7) in connexion with such questions as whether a matter governed by customary international law or by an international agreement is 'essentially within the domestic jurisdiction' of a State, and whether this is the position with respect to the provisions of the Charter in the matter of human rights, non-self-governing territories, self-determination of peoples, and the maintenance of international peace. There is also a section relating to the procedure by which Article 2 (7) has been invoked.

This example provides, it is hoped, an adequate illustration of the scope and method of the *Repertory*. It is a publication which reflects the greatest credit upon the Secretary-General and his legal advisers. It shows that the official character of a publication need not necessarily result in a product which is devoid of originality and scientific interest. Of its practical usefulness there can be no doubt. When completed—or even before—it will make necessary the re-writing of many treatises and monographs on the Charter of the United Nations. It is indispensable to any Foreign Office or delegation accredited to the United Nations. Its value is independent of the consummation or the achievements of a Review Conference. And although the mimeographed form in which it is published appears, superficially, to detract from its importance, its modest price brings it easily within the reach of most students of the subject. This, too, is a cause for satisfaction.

H. LAUTERPACHT

Comunicazioni e Studi. ROBERTO AGO, General Editor. Milan: A. Giuffré. Volume IV, 1952: 613 pp. Volume V, 1953: 669 pp.

Under the enterprising editorship of Professor Roberto Ago, this Yearbook has established itself as a representative organ of Italian students of public and private international law. The fourth volume begins with a detailed and well-documented article by Professor Cansacchi, who examines under the title 'Reality and Fiction of the Identity of States' to what extent States do in fact survive in the case of revolution, anarchy, insurrection, total belligerent occupation, dismemberment, amalgamation and subsequent re-establishment. His conclusions, based partly upon the criterion whether the legal order remains the same, and partly upon the identity of the population, may seem eclectic, but the article deserves close study. Professor Arangio-Ruiz and Dr. Bentivoglio take up suggestions developed by Morelli in a previous volume and devote their contributions to the theoretical study of 'Agreements to Settle Disputes' and 'The Nature of the International Decision'. Professor Barile deals with 'Interim Measures of Protection in the International Court of Justice' with special regard to the relation between interim measures and jurisdiction. Private international law is represented by two articles. Professor De Nova writes lucidly on recent trends and developments in the conflict of laws relating to torts. As usual, his observations are based on a complete mastery of the continental and Anglo-American literature. In substance they show a tendency to follow the views recently put forward by Dr. J. H. C. Morris. Dr. Migliazza contributes an exhaustive discussion of the difficult question as to what law governs the various legal aspects of the division of an inheritance. Dr. Lipstein writes on 'The Scrutiny of the Legislative, Executive and Judicial Acts of a Belligerent Occupant'.

In the fifth volume Mr. Clive Parry offers an original contribution to the history of British Nationality Law. Professor Biscotini examines to what extent it can be said that administrative international law, as distinct from international administrative law, has come into existence, and answers the question in the affirmative. It enables States to act as administrative consortia (in the sense of the term used in Italian administrative law) in pursuit of their administrative purposes. Professor Barile, starting from Ago's premise that customary international law arises by a process of spontaneous creation, discusses the process whereby international law courts ascertain the existence of such customary rules of international law. It would seem that this process does not differ much in substance from that hitherto assumed to be applicable. Dr. Bentivoglio writes lucidly on the interpretation by international courts of their own decisions at the request of the parties. An exhaustive study by Dr. Gentile treats of the well-known question of the competence of the Security Council and of the General Assembly in matters concerning the maintenance and restoration of peace. The only article on private international law is contributed by Dr. Migliazza, who writes learnedly on the competence and jurisdiction of Italian courts in cases involving a foreign element.

Nearly one-half of each volume is devoted to surveys dealing respectively with the decisions of the International Court of Justice, 1950–1 and 1952–3 (Dr. Migliazza); international law in the practice of Italian courts, 1950–1 and 1952 (Professor Capotorti); and private international law, 1950–1 and 1952 (Professor Ziccardi). These sections are particularly valuable seeing that they render accessible to the world at large the abundant case law developed by Italian courts, which is widely scattered in a great variety of journals. Equally useful are the surveys, covering the period from 1944 until 1952, of the trends in the literature of public international law (Professor Barile) and private international law (Professor Pau and Dr. Malintoppi). They bring out, once again, the intense interest of Italian scholars in the dogmatic and systematic exposition of legal problems. A full section of detailed book reviews completes each of these stimulating volumes.

K. Lipstein

Le Divorce, la Séparation de Corps et leurs effets en Droit International Privé Français et Anglais. By Peter Benjamin. Paris: Librairie générale de droit et de jurisprudence. 1955. xii+253 pp.

To an English lawyer, this work is both attractive and stimulating. It is attractive because Mr. Benjamin has eschewed most of the doctrinal controversy which tends to characterize continental legal literature in favour of a practical exposition of the principles of French and English private international law in matters of divorce and judicial separation supported by numerous references to decided cases. It is stimulating because the author does not hesitate to criticize, on the one hand, the complexity of the solutions adopted by application of the French system and, on the other hand, the injustice and absurdity caused by the tendency of the English system to concentrate upon the problem of jurisdiction in matrimonial suits to the exclusion of the question of choice of law.

The value of Mr. Benjamin's book lies not so much in the contrast presented between the French system—in which the question of choice of law plays a part as important as the question of jurisdiction—and the English system—in which, the competence of the English courts once established, no question of choice of law arises—as in the lessons which English private international lawyers can derive from a study of the problems with which their French counterparts have to contend. There is no answer to Mr. Benjamin's basic criticism of the paradoxical situation in English law today whereby an English court will, on the one hand, refuse, subject to the rule in *Travers* v. *Holley*, to recognize a foreign divorce decree unless it is pronounced by, or will be recognized by, the courts of the domicil of the parties and, on the other hand, permit a foreign wife to institute divorce proceedings in England on the basis of three years' residence and grant her a divorce by application of the principles of English law, notwithstanding that such a divorce will not be recognized by the courts of the domicil of the parties. Logic demands that the abandonment by English law of the principle that jurisdiction is based strictly upon domicil should also entail abandonment of the principle that English municipal law should invariably be applied even in matrimonial causes containing a foreign element. Logic alone, however, is not enough, and one of the most valuable features of this work is to indicate, by reference to the experience of the French courts in applying the distinction between jurisdiction and choice of law, the hazards with which a French lawyer may be confronted in having to prove the content of a foreign law and the difficulties with which a French judge is faced in having to interpret and apply that law—difficulties which are too often overcome by the facile expedient of denying the applicability of the foreign law by reference to the exception of '*ordre public*'. It is unfortunately true that in practice the barriers in the way of securing evidence of foreign law are formidable, but such barriers should not be permitted to impede development of a more rational approach. It is to be hoped that, while due attention is paid to the experience of foreign countries in applying choice of law rules in divorce cases, steps will soon be taken to remedy the present deplorable situation whereby the English courts may now assume jurisdiction in divorce on a non-domiciliar basis and arrogate to themselves the right to pronounce a divorce in application of English law, notwithstanding that the law of the domicil of the parties refuses to accept that divorce either because it does not recognize the institution of divorce or because it does not recognize the grounds invoked.

The illuminating light which Mr. Benjamin's work sheds on this notorious defect of English private international law extends also to such ancillary questions as the recognition accorded by English and French law respectively to foreign divorce decrees and their effects. No English lawyer can fail to be impressed by the care and learning which Mr. Benjamin has brought to his task; and equally no lawyer, whether English or French, can fail to derive benefit from a study of how the two systems, in their several environments, have reacted to the challenge presented by the increased number and complexity of divorce cases containing a foreign element as a result of the recent improvement in methods of travel and communications. Mr. Benjamin is to be congratulated, not only for his practical and scholarly exposition of the principles of French and English private international law in this important field, but also for the timeliness of his contribution to the thinking of English lawyers who are becoming more than ever aware of the incongruity of their failure to apprehend the distinction between jurisdiction and choice of law in the field of private international law relating to divorce.

I. M. Sinclair

Rechtsfragen der europäischen Einigung, ein Beitrag zu der Lehre von den Staatenverbindungen. By Rudolf L. Bindschedler. Basle: Verlag für Recht und Gesellschaft AG. 1954.

Dr. Bindschedler's is the most comprehensive contribution to the literature on legal problems arising in connexion with European integration yet published in any language. It also deals extensively with the broader aspects of the political and economic implications of the movement towards increased European co-operation, and to the best of the reviewer's knowledge Dr. Bindschedler is the first to have undertaken the onerous task of presenting a comprehensive picture of a primarily legal approach to European federation.

That the unification of Europe can only be attempted and ultimately achieved by a federation of European States (*Staatenverbindung*) cannot be doubted, and from the outset the author rejects the alternative—and in his view academic—methods of annexation by one State of all other States and the factual supremacy of the former over the latter. Federation can thus be brought about only within the framework of law, its legal basis being an international treaty. It follows that the general rules governing treaties must apply to all matters forming the subject of that treaty, and in particular to withdrawal from the community, impossibility of performance and the scope of the *clausula rebus sic stantibus*. The desirability of making express provision for the circumstances in which a party to a multilateral treaty is entitled to treat a violation of the treaty by another party as conferring upon it the right to consider itself no longer bound by the obligations for which the treaty provides, has made itself increasingly felt in recent years. The need for such express provision is even greater where the treaty concerned sets up an organization with distinct legal personality, and where the question of determining the right to withdraw from the organization in certain circumstances may sometimes prove to be well-nigh impossible of solution. And what is to happen if the violation of the treaty results from an otherwise binding decision of the organization itself, as distinct from an act or decision of one of the member States? A violation of this kind can hardly be laid at the door of the member States collectively, and the principle that a party which has abstained from voting or has cast a negative vote is entitled to regard all other Contracting Parties as having acted in violation of the treaty and as thereby conferring upon the dissenting State the right to withdraw can hardly apply. In cases such as these there may well arise a conflict between the widely accepted rule of law which would deny the right to withdraw and the basic political concept which has called the organization into existence. Such conflicts, it is thought, can be resolved only by specific rules to be inserted in the constituent instrument of the organization. With regard to impossibility of performance of a more than transitory character, there apply general principles applicable to treaties. It may be doubted, however, whether an organizational treaty, providing as it does for a multitude of rights and obligations, can ever become wholly invalid on this ground. The *ratio decidendi* of awards determining the question of impossibility in disputes between States is not necessarily relevant to a plea of impossibility of performance *vis-à-vis* an organization of which the State concerned is a party. The same, it is thought, is true of a plea placing reliance upon the *clausula rebus sic stantibus*.

In examining the problem as to how conflicts between member States and between member States and the organization can be solved, the author puts forward some interesting suggestions. He appears to be in favour of limiting the jurisdiction of a European Court to contentious cases. His objections, however, to conferring upon the Court advisory jurisdiction seemed to the reviewer ill-founded as well as contrary to experience. Dr. Bindschedler propounds the view that as advisory opinions are not binding they are liable to undermine the authority of such a Court, and, furthermore, that they may create inconvenient precedents if ever the Court were to be called upon subsequently to decide the same issues in contentious proceedings. The first objection would be valid only if experience warranted the assumption that States habitually refused to act in accordance with advisory opinions. That this is not so is amply borne out—with few exceptions—by the experience of the advisory jurisdiction of the International Court of Justice. With regard to the second objection, the existence of precedents is to be welcomed rather than deprecated, as being the best method of developing a body of case law and gradually establishing a judicial tradition. This is all the more important in view of the relatively narrow jurisdiction of a European Court *ratione materiae* which, in the nature of things, would preclude it from adding much to the authoritative interpretation and development of general international law. Moreover, such little experience as has been gained from the activity of the Court of the Coal and Steel Community shows that of the cases submitted for judicial determination only a few have reached the final stage of adjudication.

Dr. Bindschedler accepts the traditional principle that political questions must be excluded from the competence of the Court, but he appears to cast doubt on the desirability of conferring upon the Court jurisdiction to determine the question whether laws enacted by the organization are compatible with its statute. Three alternative solutions may be envisaged for the determination of questions of this kind: laws enacted by the organization may, without more, be treated as binding, irrespective of whether or not they are in conformity with the statute; the task of deciding whether they conform to the statute may be entrusted to some non-judicial body; or it may be entrusted to a judicial body. Once the basic issue has been resolved in favour of some measure of control, it is difficult to imagine control being exercised by a non-judicial body. Constitutional precedent, where it exists, is certainly in favour of judicial rather than administrative control.

Much of the matter contained in Part II of the book under review, to which reference has been made, is concerned with the *lex ferenda*, and it is substantially Part III which contains an exposition of the law governing the existing European organizations, none of which can easily be fitted into any of the traditional categories of *Staatenverbindungen.* Dr. Bindschedler deals with each of these separately and in accordance with a uniform scheme: their duration and field of application, both territorially and *ratione materiae*; their internal organization; the methods of making decisions and recommendations; the relationship between each organization and member States; the guarantees provided for the enforcement of the statute and the settlement of disputes; and the relationship between each organization and non-member States. Finally, the author turns to the problem of co-ordination between the various organizations, a problem which must be solved if the whole concept of European integration is not to fall into disrepute. The number of organizations, as Dr. Bindschedler points out, is such that the underlying ideal of the unification of Europe may well lose the sympathy and support of public opinion for sheer lack of comprehension. The problem of co-ordination, therefore, cannot be dismissed as being one of concern only to lawyers; it is also of far-reaching political importance. Dr. Bindschedler envisages four possible solutions: co-ordination by means of agreements between the various organizations on the model of the agreements concluded between the United Nations and the Specialized Agencies; factual co-ordination, viz. the same staffs to serve in different organizations; the application of the principle of so-called 'dédoublement fonctionnel'; and finally, the amalgamation of all existing organizations into one single organization. The last solution, if politically practicable, would be the most convenient, but it is far too early to express a definitive opinion as to its desirability. A certain degree of 'dédoublement fonctionnel' has already been achieved as between the European Payments Union and the Organization for European Economic Co-operation. It was contemplated—though in the event not realized—as between the Coal and Steel Community and the European Defence Community. A judicious extension of the principle of 'dédoublement fonctionnel' may well provide the immediate answer to the problem of co-ordination in present circumstances.

It is hoped that the reviewer has been able to convey some idea of the author's masterly and comprehensive exposition of a branch of law which is as yet largely unexplored. He only regrets that Dr. Bindschedler's book went to press before Western European Union was established. Much useful information, however, is contained in the Chapter dealing with the European Defence Community, which was presumably still practical politics when Dr. Bindschedler completed his manuscript.

F. Honig

Histoire de la Sainte Alliance. By Maurice Bourquin. Geneva: Librairie de l'Université, Georg & Cie S.A. 1954. 507 pp.

This book is not a study in diplomatic history; it is the history of a political institution, especially in the light of its bearing upon the problem of international organization. The author has endeavoured to present a view of the Holy Alliance other than that of it as a mere instrument of reaction, the conventional idea of many elementary textbooks on history even in quite recent times. The diplomatic instrument signed in Paris in 1815 by the three monarchs of Russia, Austria, and Prussia, was as noble in language and sentiment as any international document ever drafted; like all things human it was capable of being directed to good or evil ends. Its significance for political thought was that it did not isolate international affairs from the realm of politics in general, but sought to subject them to the same general principles of conduct as were conceived, according to the precepts of Christianity, to be applicable in all fields of life. 'I am a great lover of morality, public and private', remarked Lord Grey to his friend Princess Lieven, 'but the intercourse of states cannot be strictly regulated by that rule.' The ostensible object of the Holy Alliance was to provide a moral basis for international relations, but it has seldom been taken seriously from that point of view. Mr. Eppstein, in his learned work, *The Catholic Tradition of the Law of Nations*, does not even mention it, and the Pope, in the strange company of the Prince Regent and the Sublime Porte, was not a party to it.

Professor Bourquin's book is divided into four parts. The first describes the historical context in which the Holy Alliance was born, the political and social condition of Europe at the end of the Napoleonic Wars. The second recounts the diplomatic history of the formation of the Alliance. In the third and fourth parts, which constitute the bulk of the work, he examines successively the impact of the Alliance, first upon the European system, and second upon events in the New World, in particular the revolutions of South America. The Epilogue to the book deals with the 'agony' of the Alliance, and its replacement as a political factor by the Concert of Europe, which, in a few brief conclusions, Professor Bourquin describes as the 'soul' of the Holy Alliance, the conviction that the unity of Europe rests upon the solidarity of the Great Powers. Such is the theme, developed, as we have learnt to expect, with learning, distinction of style, and lucidity of exposition.

The European system which emerged at the end of the medieval period was stabilized by the Peace of Westphalia in 1648 and remained substantially unaltered until 1789. The Revolutionary Wars represented an effort by France to impose a new principle of unity upon Europe which it refused to accept; nevertheless, the need for some such unity was more than ever realized after the defeat of Napoleon. The thought of the time became centred upon the conviction that it was necessary to devise new means of achieving that unity otherwise than through the traditional methods of diplomacy. Baader in Germany proposed a federation of Europe based upon the principles of Christianity; in France St. Simon published, in 1814, *De la réorganisation de la société Européenne*, advocating a democratic and parliamentary Europe built upon a close union between France and England. Europe had rejected unity based upon the domination of a single Power—the imperial conception. The alternative was unity based upon the federal principle, involving an equilibrium of States bound together by a common aim. This was the solution offered by the Holy Alliance, signed on 26 September 1815 by the Tsar of Russia, the Emperor of Austria, and the King of Prussia, to which all Christian sovereigns were invited to adhere, and which, with the exceptions already mentioned, ultimately embraced (diplomatically) the greater part of Europe.

It has been customary amongst English historians to distinguish this document, with the declaration that it enshrined, adopting the precepts of Christianity as a rule of conduct between Governments, from the 'Congress system', founded by the Quadruple Alliance, signed at Chaumont on 9 March 1814 by Austria, Great Britain, Russia, and Prussia, and the Treaty of Paris of 20 November 1815 between the same parties, which was supplementary to it, and which, by providing for periodic meetings of the Powers, enlarged the scope of the Quadruple Alliance in a vital point. These last two treaties were strictly confined to establishing a political alliance and a procedure of consultation and collective action amongst the Great Powers, limited, moreover, in scope to the European order, and not extending to their colonial possessions, a fact which became of great importance later in connexion with events in the New World.

It seems clear that the Tsar Alexander frequently distinguished between the Quadruple Alliance and the 'General Alliance' of 26 September 1815, to which most European States were parties; in practice, however, the latter passed more and more into the background, though its ideas continued to have influence long after the Congress system was dead. It may be thought that Professor Bourquin insufficiently stresses the extent of this influence, especially on Russian foreign policy, as, for example, with regard to the intervention in Hungary in 1849 and the convoking of the Hague Peace Conferences. However this may be, for the purposes of his study he identifies the Holy Alliance, not exclusively with the treaty of 26 September 1815, but with 'l'ensemble des traités qui avait organisé l'Europe après la chute de Napoléon', of which the treaty itself formed but one element (pp. 85, 162). He sees in the system thus established, first, a philosophy, 'plus exactement une mystique', which remained without influence upon the attitude of Governments, secondly, a military alliance, and, thirdly, a procedure of consultation—its most important element. His book is an exposition of these trends, not always acting in unison. He further extends his field of study by dealing with the negotiations between Russia and England which took place in London in the year 1804, in the course of which the Russian Government proposed a permanent system for the organization of peace in Europe. As we have noted, Professor Bourquin is not primarily concerned with diplomatic history, but with the idea of international organization, conceived not as a theory but as a political reality. From this point of view a knowledge of the 1804 conversations is shown to be indispensable to the understanding of the genesis of the Holy Alliance. The ideas of the Russian Government and of the Tsar Alexander were developed at length in the 'Secret Instructions' given to Novosiltsov, the special envoy to London. Professor Bourquin considers these in some detail, since they formed the philosophic basis of the Russian attitude to the reorganization of Europe after the fall of Napoleon. Those instructions laid primary emphasis upon the principle that stability in international relations was only possible if the internal political régimes of European States were based on liberal ideas; in this respect it was essential to the peace of Europe to expose the fraudulent claims of France to pose as the apostle of liberty. Although the chronic fear of revolution caused the Russian Government later to betray this principle, it must be regarded as one of the most important doctrines advanced at this time. It anticipated by more than a century a distinctive element in Wilsonian thinking about international organization. Secondly, the Russian Government advocated a codification of the law of nations not only with a view to clarifying its existing content, but also with the object of establishing new rules adapted to the purpose of the peaceful regulation of the relations of States, especially in the sphere of maritime law and in the sphere of the settlement of disputes. This idea did not disappear with the death of the Holy Alliance but lived to inspire the Russian initiative in summoning the Hague Peace Conference at the close of the century. Thirdly, a league should be formed consisting of those States who 'really desired to remain in peace' by whom the observance of the law of nations would be guaranteed and its enforcement sanctioned. This league, though open to all such States, would be under the general direction of Russia and England; these two Powers would exercise a preponderant influence on the affairs of Europe. It was upon the last of these principles that the British Government fixed its attention—the conception of a league to enforce peace—and it was to this principle that it subscribed in modified form in the Quadruple Alliance. The Pitt Memorandum of 1805, which was approved by the Cabinet, concentrated upon the establishment, at the restoration of peace, of a European system of mutual guarantee and security, and of a general system of public law in Europe. The two Governments, by an agreement of 30 March 1805, pledged themselves to meet, in a general Congress at the end of the war, to discuss the establishment of the law of nations upon 'more precise foundations', and to ensure its observance by setting up a federal system which would protect the weak Powers against the ambitions of the strong. In fact the Treaty of Chaumont (the Quadruple Alliance) provided, not for a general system of collective security, but only for mutual guarantees against a renewal of French aggression, and, although technically open to all States, it remained a four-Power affair. Meanwhile the hostility of British public opinion towards any general commitments and the appointment as Foreign Secretary (a post incorrectly referred to throughout the book as 'chef du Foreign Office') first of Castlereagh and later of Canning, prevented the establishment of such a general system as had been envisaged in 1804–5. Moreover, the escape of Napoleon from Elba, which gave the French monarchy the opportunity to ingratiate itself with the coalition against him, and the subsequent rapid recovery by France of its position in Europe, rapidly transformed the political relations of the great Powers. With the admission of France to the European directorate at the Congress of Aix-la-Chapelle in 1818 the idea of a general system of security was gradually replaced by that of the Concert of Europe. The growth of Anglo-Russian rivalry, and Russian jealousies on the subject of British maritime supremacy, gave France her opportunity to play her role in the balance of power, in which England and France on the one hand opposed Russia, Austria and Prussia on the other. This division between the members of the former Quadruple Alliance became manifest at the Congress of Troppau, where the principal question was that of intervention by the Great Powers to suppress the revolution in Naples. Of this Professor Bourquin writes (p. 278): 'C'est le moment où triomphe la thèse russe de l'intervention collective. C'est le moment aussi où Alexandre se rallie aux idées conservatrices de Metternich et justifia, après coup, les appréhensions des milieux libéraux en faisant de cette Sainte Alliance un instrument de réaction.' The Final Protocol condemned formally every Government whose accession to power had been obtained by the violent overthrow of the internal political régime of the State, and records that the Allied Powers would refuse to recognize such a Government, thus consecrating, as Professor Bourquin observes, what in a later epoch came to be known as the Tobar doctrine. The Protocol envisaged positive measures of intervention, at first friendly, 'en second lieu coercitive si l'emploi de cette force devenait indispensable'. The Austrian Army was commissioned on behalf of the Powers with the task of enforcing these principles in the Kingdom of the Two Sicilies.

The manner in which England and France, whilst not publicly disavowing these policies, in fact dissociated themselves from them, is described by Professor Bourquin with subtlety and finesse. He sees in this development the origin of a Franco-British entente based upon the principles of constitutional monarchy, and occupying a position intermediate between the absolutism of the East and the democratic republicanism of the New World (a sort of opportunist 'third force'—of brief duration however). The Congress of Laibach applied the principles of Troppau, somewhat lukewarmly, to the Greek revolution, although recognizing that this involved 'des circonstances très différantes'. It involved, in fact, the question whether Russia, in support of the legitimist principle, was to abandon her role as protector of the Christian peoples of eastern Europe against the Turk. Having failed to secure a collective protest addressed to the Sublime Porte, Russia took unilateral action and invoked existing treaties against Turkey in an ultimatum demanding redress for the grievances of the Christian communities of the Ottoman Empire. But the objectives of Russian policy in the Balkans were suspect in the eyes of the other Great Powers and led to a temporary *rapprochement* between Metternich and Castlereagh, who, addressing the Tsar, declared that the dismemberment of the Ottoman Empire would be the source of 'most terrible dangers' to His Imperial Majesty's possessions as well as for the whole civilized world (p. 310). When Alexander affirmed that the Sultan's dominions were not protected by the Treaties of Vienna Castlereagh demurred, and maintained that the entire European system, including Turkey, was placed under the protection of the 'general alliance'. 'Castlereagh, on le voit, n'hésitait pas le cas échéant à exploiter à fond les ressources de la Sainte Alliance pour atteindre son objectif' (p. 314). Ultimately the Tsar, alarmed by the republicanism of the Greek insurgents and repelled by their lack of concern for Russian interests, retraced his steps and at the Congress of Verona not a single voice was raised on behalf of the Greeks. It was at this Congress (1822) that the Alliance finally foundered upon the question of intervention in Spanish affairs. At this point Castlereagh committed suicide, and British foreign policy came under the direction of Canning, whose object it was to disentangle England from the Alliance and to extend British influence in the New World. The resulting manœuvres at Verona, the refusal of the Duke of Wellington, who represented England at that Congress, to participate in collective intervention to put down revolution in Spain, or to join in guarantees to France against Spanish aggression, the unwillingness, on the other hand, of the British Government to acquiesce in single-handed intervention by the French—all this is brilliantly described by Professor Bourquin. The isolation of England from the policies of the other Powers commenced. 'La fissure s'élargit', writes the author. 'Le fossé se creuse' (p. 348). If it appears that some members of the British Government encouraged French intervention (p. 355) the official attitude of Canning was non-intervention. This also was his policy towards South America. He saw that the revolutions there destroyed the colonial and economic monopolies of Spain, and he did not wish them restored. England soon recognized the flags of the Latin-American Republics in her ports, and their produce arrived in British and American ships; the implications for British commerce of the independence of South America from Spain were tremendous. In the eyes of the Holy Alliance (now reduced to its original membership) the new Republics were a menace to the political and social order of Europe; it was thought that if the New World became entirely republican the European monarchies would perish. Futile and despairing efforts were made by Russia to induce the United States to join the Alliance, whilst Canning engaged in negotiations in a vain effort to secure a common line based on Anglo-American naval power. Even France joined in the diplomatic game of trying to enlist American support for her policies. The United States preferred to retain its liberty of action, and, by proclaiming on 2 December 1823 the Monroe Doctrine, put an end to the intrigues of the Old World, including the bilateral conversations between Canning and Polignac which came to nothing (pp. 414–20).

Canning had wished full-scale recognition of the new Republics to follow recognition by the United States (which had occurred in April 1822), but failed to carry the British Cabinet with him. Castlereagh had, before his death, drafted instructions for the British representative at the Congress of Verona, which are interesting from the standpoint of the history of the doctrine of the recognition of States and Governments. He considered recognition of the new States to be a question of time, not of principle, and distinguished between *de facto* recognition (the admission of Latin-American flags to British ports), 'diplomatic' recognition (the exchange of diplomatic representatives with the new States) and *de jure* recognition (a judgment on the legal status of the new States). It was in 'diplomatic' recognition that British policy was chiefly interested, and in respect of which it desired to be freed from the limitations of collective action under the Alliance. Professor Bourquin touches briefly on this last phase of his subject (pp. 401–5, 418–25), for the recognition by Great Britain, in February 1825, of Mexico, Columbia, and the United Provinces of the Plate was the death-blow of the Alliance; henceforth it was to exist only in the pages of history. Its essential principle, however, the entente of the Great Powers, was later to revive in the Concert of Europe.

The book is beautifully produced and contains an extensive bibliography.

J. M. J.

The Present Law of War and Neutrality. By ERIK CASTRÉN, LL.D. (translated from the Finnish by Dr. Richard Tötterman). Helsinki: Published by the Finnish Academy of Science and Letters (Suomalaisen Tiedeakatemian Toimituksia [Annales Academiae Scientiarum Fennicae]). 1954. 630 pp. 1800 Mk.

As its title indicates, the purpose of this book is to survey the present law of war and neutrality. The author, who is the Professor of Constitutional and International Law in the University of Helsinki, has succeeded in presenting a comprehensive summary of the relevant conventional rules—especially the Geneva Conventions of 1949—expanded by a well-proportioned evaluation of the appropriate customary law and a careful inquiry into the reasons with which, from time to time, States have justified their conduct of hostilities. Each section of the book is introduced by a short heading supplemented by an exhaustive bibliography. The author traces the development of the laws of warfare and neutrality, mentioning particularly the contribution of the United States to the growth of the law of neutrality and that of the Institute of International Law to the clarification of the law of war and neutrality generally. He makes the bold assertion that the laws of warfare constitute both the foundation, and the major part, of international law.

At the outset Professor Castrén defends his undertaking of this work by explaining that the use of force has not yet been eliminated from international relations and therefore its regulation continues to be of the utmost importance. Moreover, he asserts that the present laws of warfare have become largely obsolete by reason of the rapid development of warlike instruments, and that hence they deserve immediate and careful consideration with a view to their revision. He considers that the process of codification, which terminated so abruptly with the First World War, should be resumed as soon as possible, since even when the relations of States are controlled by some international organization, the enforcement of law and order may still require measures of compulsion, and therefore some regulation of the methods of force adopted will be necessary. He states that whatever title may be given to this system of regulation, its content can be neither more nor less than the rules of warfare.

Professor Castrén stigmatizes as both dangerous and unwarranted the now widely accepted assumption that once a conflict has begun the rule of law is to be regarded as having passed into temporary abeyance. In his view, breaches of the rules of warfare are exceptional; only if they are sanctioned by general acquiescence do they displace the authority of the law. He points out that the result of this process must be that hostilities become increasingly more violent, thereby rendering pacific intercourse, and hence the prospect of an immediate restoration of normal relations between the belligerents, almost impossible. Consequently, he declares that a clear distinction should be drawn between what he calls the first wrong of resorting to war, and the second wrong of using illegal methods once war has begun.

A primary problem which Professor Castrén contemplates is that every exposition of the laws of warfare must find a satisfactory definition of *war* itself. This naturally introduces the controversy between, on the one hand, the *subjective view* of the existence of war, which declines to define any situation as war unless at least one of the parties concerned formally admits that a state of war has arisen between them, and, on the other, the *objective view*, which discovers a condition of war in almost every circumstance in which hostilities are taking place. The author suggests that when a conflict is the concern solely of the participants and in no way affects any other State, then the right to define its status ought to rest entirely with those participating. He disapproves of both the British view of the retroactive effect of a subsequent declaration of war (whether express or implied), and also of the proposed solution whereby the definition of the situation would be entrusted to, or shared by, States neither engaged in, nor in any way concerned with, the conflict. Nevertheless, he expresses the opinion that if a contest affects States not directly engaged in it so that they are confronted with the exercise of belligerent privileges by the combatants, then these third parties may insist upon their right to be treated as formally neutral, thereby raising the status of the issue to that of a formal war. The author distinguishes a mere *contest of arms* from a *state of war*, and dismisses as pointless the attempt to distinguish between *de facto* and *de jure* warfare. But he fails to lay sufficient stress upon the significance of the act of recognition of belligerency, or, in the alternative, the need for a clear rule for the application of the laws of warfare.

The contrast sometimes made between the so-called 'Continental' and the 'Anglo-American' theories of war predicates a distinction without a difference, and Professor Castrén clearly perceives that these allegedly opposite views in fact differ only in their approach to the rules governing what is often termed 'economic warfare'. Furthermore, he realizes that although the right to resort to war may be limited it cannot be effectively renounced, since it represents the ultimate safeguard of the independence of the national sovereign and is as vital to a State as the right of self-defence is essential to an individual. The writer also recognizes that the readiness of States to invoke the justification of self-preservation, and the failure of the attempt to adapt the concept of the *just war* to modern conditions, indicate the unwillingness of States to renounce the right to resort to war, and further emphasize the necessity of retaining it.

Professor Castrén observes that the major part of the laws of warfare is customary law. Admittedly, conventions have been concluded to regulate some of the situations and relationships which arise in time of war. However, the author implies that, apart from the Geneva Conventions of 1929 and 1949 and the Geneva 'Gas' Protocol of 1925, these treaties are largely out of date. He remarks that even those conventions which have received the approval of States adopt an artificial distinction between the regulations applicable to similar situations in land or sea warfare. Noteworthy illustrations of this tendency are the rules of military and naval bombardment, and the definitions of lawful combatants and the preconditions of their status. Underlying and, indeed, undermining the entire structure of custom and convention, Professor Castrén sees the doctrine of necessity (chiefly as propounded by German writers) as the cardinal enemy of law and order, which threatens to destroy even those rules which so far have received reasonable obedience. He considers, therefore, that unless the doctrine of necessity is recognized as neither a primary source of law nor a fundamental right which may conveniently be invoked to sanction the disregard of clearly established rules, but rather as no more than a special privilege contained within, and governed by, the general *corpus* of the law, the laws of warfare—and hence also international law itself—may well be doomed.

Other exceptions to the binding force of the laws of warfare discussed by the author include reprisals, self-defence, and duress. Of these, he considers that the plea of duress is virtually that of necessity and that if it is not to become a severe abuse it requires to be carefully regulated. He treats reprisals as a mode of self-defence which may be continued after the immediate reason for their exercise has ceased. The writer mentions the Geneva Conventions of 1949 which render illegal certain types of reprisals, and in particular reprisals against civilians. However, he does not offer a critical account of their relevant terms, nor does he appear to realize that the provisions of the Geneva 'Civilians' Convention in some respects expect self-denying restraint on the part of military authorities, but enjoin practically no corresponding duty of passive obedience by the civil population. Furthermore, he attempts to distinguish reprisals from self-defence although they constitute no more than one means of self-defence; for, in fact, the law requires that they be proportionate to, and hence a reasonable sanction against, the offence they are intended to counter. Thus, even prophylactic reprisals (which the author does not describe) merely anticipate a definite breach of law and are considered reprehensible only because they precede the illegality they are designed to prevent.

The geographical region of war is discussed in detail with reference to the problems caused by mandates, trust territories, leases and protectorates, and to the changing attitude of States to the concept of neutrality. Similarly, the legal effects of the commencement of war are explained in detail with special allusion to the misfortunes of the enemy alien and the stateless person. The right of audience of an enemy alien in the tribunals of the belligerent State in which he resides is clearly declared in Article 23 (*h*) of the Hague Regulations. The author disapproves of the British interpretation which nullifies the effect of this Article by confining its application to territory suffering belligerent invasion or occupation. The comparison, undertaken by the author, between the test of enemy character adopted by the Anglo-American school of thought, and that favoured on the Continent of Europe, once again reveals that the respective practices of the groups of States concerned have much in common despite their theoretical divergencies. The advantages of requiring a written and formal declaration of war, including time of grace in which negotiations may yet prevent the onset of hostile measures, are also succinctly explained, the chief purpose of such a declaration being to regularize the situation and thus to define the status of the parties and their relationships with other Powers.

Having discussed the effect of the beginning of hostilities, the author considers the modes of suspension and termination of warfare. He makes no effective investigation of the problem of agency in the pacific intercourse of belligerents. However, he is prepared to suggest that co-belligerents, bound *inter se* by a treaty of alliance, might conceivably share vicarious responsibility for the manner in which their hostilities are conducted. Nevertheless he refutes the general propositions that allied Powers may be deemed to be an indivisible warlike unit, and that the wrong of one State may be attributable to its ally. In maintaining order through effective discipline, States are handicapped if they employ uncontrollable irregular forces. The objection to permitting the activities of resistance movements and other irregular combatants may be summarized in the words of the author that 'even soldiers are human beings and must be protected from treacherous assaults by individuals', which almost echo the phrases chosen by the German representatives at the Hague Conferences of 1899 and 1907. This is, indeed, a refreshing view, which appears to be consistent with justice and is entirely in accordance with the provisions of the Geneva Convention of 1949 relative to Prisoners of War. It rejects the tolerant view of partisan movements taken by so many European tribunals and writers—and particularly by Soviet jurists—after the Second World War.

None the less, a deficiency of the law is its failure to define the status and obligations of civilians, for example, munition workers, who contribute indirectly to the strength of the armed forces. The scope of this problem has increased, as the author explains, with the rapid development of air power. Professor Castrén's treatment of the subject demonstrates how the law of air warfare is confronted by an extension of the means of bombardment, from both land and sea, accompanied by new devices whereby blockade, espionage and the transportation of supplies are facilitated. The learned author completes his examination of the rules of air warfare with a summary of the law of prize and of the rules governing the various types of combatants, together with a synopsis of part of the Hague Air Warfare Rules of 1922–3. He qualifies his observations with the reminder that, apart from the provisions of the Geneva Conventions of 1929 and 1949, international law, so far as it concerns the exercise of belligerent rights by means of aircraft, as yet consists entirely of customary rules derived by analogy from the laws of land and sea warfare.

Both civilian and military spies play an important part in belligerent operations, and the rules concerning espionage receive due attention, especially the difficulty of resolving the precise meaning of Article 31 of the Hague Regulations, now further complicated by the advent of aircraft. The author inquires into the question whether the use of spies is lawful and, likewise, whether espionage constitutes a violation of international law. Possibly he might have found useful the drawing of an analogy between the spy and the neutral subject who indulges in contraband traffic. Neither espionage nor carriage of contraband is an offence against international law but, as an act of self-protection, a belligerent is permitted to punish participants in either of these activities.

Professor Castrén divides his analysis of lawful and unlawful methods of warfare into two parts. In the first part, under the rubric of 'General Principles', he concentrates upon the rule of proportionality between the object and the means of its attainment. In this context he refers disapprovingly to what he calls 'psychological' or 'terror' bombardment of civilians. The second part is devoted to a review of particular rules, including those which govern the types and lawful uses of weapons, and the right to employ economic pressure. He observes that propaganda is a subject almost unregulated by the law of nations. However, neither the legality of ruses by means of deceptive uniforms, insignia or flags, nor the distinction between lawful camouflage and unlawful disguise, receives more than superficial attention, although the author deprecates the inadequacy of the law concerning the use (and abuse) of insignia and badges, and the bad drafting of the few relevant conventional rules. The laws of sea—and even air—warfare governing this matter of deception are clearer and more firmly established than those of land warfare, and this becomes apparent from the author's treatment of the subject, although he omits to explain that this state of affairs has arisen largely by reason of decisions of prize courts.

The rules prescribing limitations upon bombardment, which vary according to whether they apply to land, sea, or air warfare, lead the author to a discussion of the whole subject of lawful military objectives and restrictions on the right of destruction and devastation. In his view, the atomic bomb is probably an unlawful weapon, not only for the reason given by Spaight (*Air Power and War Rights*, 1947) that its limitation to purely military targets is almost impossible, except far out at sea—which is an objection, not to the right to use this instrument, but only to its employment in certain circumstances—but also because possibly it contravenes the Geneva 'Gas' Protocol of 1925. Whereas flamethrowers are accorded specific scrutiny, a chemical weapon that receives not so much as a paragraph is *napalm*. Yet this might usefully have been discussed in view of its extensive use in Korea by the Americans, and in Indo-China by the French.

A consideration of the problems of war at sea fills more than one-fifth of the entire book. The peculiarities of naval warfare, especially the fact that it is usually the mode of hostility most directly concerned with whatever economic pressure may be brought to bear upon an enemy State, engage the close attention of the writer. Classifying the several participants in this form of warfare, he takes the view that the chief deficiency of the Seventh Hague Convention of 1907 is that it does not prescribe *where* a merchantman may be converted into a warship. Submarine cables are given particular consideration by reason of their importance to the commerce of all nations. Likewise, weapons, such as submarine vessels, torpedoes and contact-mines, which are peculiar to naval warfare, are afforded separate treatment. Reference is also made to the laying of mines generally in such a way that a neutral State is injured or neutral territory violated.

Professor Castrén describes the evolution of the law of blockade, and comments upon the fact that modern weapons and engines of transport have rendered the traditional close blockade both ineffectual and dangerous to the blockading Power. He indicates the legal principles founding the rights and duties of blockade, and assesses the significance of blockade in modern warfare and in international relations. By his references to recent examples of blockades, such as the German 'paper' blockade of the Finnish coast in 1944, the Soviet 'blockade' of Finland in 1939, the long-range blockades of the First and Second World Wars, the views of the Great Powers in the Chinese Civil War in 1949 and the Korean conflict of 1950–3, he indicates his unwillingness either to be fettered by antiquated notions or to be moved by novel but irrelevant arguments and circumstances. Thus he affirms the principle that mere change of fact does not in itself alter legal rights and obligations, and he abides by the time-honoured distinction between contraband and blockade on the one hand and unneutral service on the other, with the difference between blockade and the mere closure of ports assuredly maintained, while the juridical bases of contraband, blockade and neutrality are carefully analysed. In his view the long-range blockade is illegal. The greater part of the sections of this book which are devoted to naval warfare consists in a description of visit, search, capture and prize proceedings, their necessity and legality, their formal and essential validity, the consequences of their invalidity, and the many difficulties which recent warfare has thrust upon them. Later in the book he makes the controversial assertion that the right of angary 'has never been resorted to on the high seas'. Considerable use is made of the terms of the unratified Declaration of London of 1909 and the subsequent practice of States. This extensive and enlightening examination culminates in a reference to the fact that, as the Powers declined to ratify the Twelfth Hague Convention of 1907, they thereby prevented the birth of an international prize court.

Finally, almost a third of the whole book is employed in describing the law of neutrality, beginning with the juridical concept of neutrality, distinguishing the condition of *ad hoc* neutrality in time of war from the status of permanent neutrality, and elaborating upon the bare duties and rights of neutrals provided for by the Hague Conventions of 1907. Once again the writer reveals the historical differences in the attitudes of Governments towards land warfare and war at sea, while he demonstrates the development of rules applicable to air warfare, which are derived by analogy from the rules of land and sea warfare. An examination of the practice of States and an analysis of the relevant conventions conclude this part of the treatise. However, the learned author appends a warning that the whole notion of neutrality may have been modified by the conduct of States during the two World Wars. He draws attention to the provisions of the Charter of the United Nations, observing that, although membership of the United Nations may be inconsistent with the traditional status of neutrality, nevertheless circumstances may arise—for example, when the Security Council fails to resolve to take action against an aggressor State, or in the event of a civil war—in which the rules of neutrality may still be called into operation.

Throughout the book many useful suggestions are made both to clarify the probable meaning of the content of the present law and also proposing necessary reforms. Perhaps a little too much value is attached to the opinions of jurists in land warfare and the decisions of judicial tribunals in sea warfare. However, these minor blemishes are amply compensated by frequent quotation of municipal military and naval regulations and the insertion of a wealth of historical illustration to expand the detailed description of sea warfare and neutrality. The translator has provided an unobtrusive and reasonably simple English text. The absence of any recent comprehensive inquiry into the law of war and neutrality make this volume a timely and valuable contribution to the study of the subject.

D. J. L. Brown

Théories et Réalités en Droit International Public. By Charles de Visscher. Paris: Éditions A. Pedone. 1953. 467 pp.

This work, which is in essence a study of the relationship of international law and politics, is informed by a critical and humane spirit. Professor Charles de Visscher —until recently one of the Judges of the International Court of Justice—brings to his task a combination of deep learning and a wide experience of international affairs which claims for his writings the most careful attention. His book is by no means an easy one for the student of the elements of international law; the very selectivity of his references presupposes on the part of the reader a considerable and advanced knowledge, not only of international law, but of history. But for the international lawyer who has already found his bearings in his subject this is a book of first-class importance, meriting the close study and reflection with which it has clearly been written.

The positivist school of international law, which was predominant throughout the greater part of the nineteenth century and up to the outbreak of the First World War, confined itself to the presentation of rules based, or supposed to be based, exclusively upon the consent of states. It isolated international law from its moral and political foundations, and thus reduced it to a series of abstract dogmas leaving no room for the operation within the legal system of any dynamic or critical element. The earliest reactions against this school of thought were symbolized after the First World War by the publication on the Continent of Politis's *Nouvelles tendances du droit international*; yet much of the literature inspired by that remarkable book assumed a somewhat speculative character, not without value for the development of international law, but impatient of the obstacles to such development, and inclined to ignore, as merely reactionary, the decisive part which sovereignty continued to play in international relations. Such was the temper of an age which Professor E. H. Carr has derided as Utopian. The present work, though manifestly not uninfluenced in some degree by Carr's writings, does not bear marks of the appearance of cynicism which has marred for some their appreciation of his undoubted brilliance. Professor de Visscher's philosophy is too close to Christian humanism, his style too urbane, his affirmation of the moral basis of international law and relations ('les valeurs humaines, les seules qui puissent commander un assentiment universel', p. 161) too insistent to enable him to abound in Professor Carr's sentiments. Moreover, he is a jurist and Professor Carr is not; the discipline of his subject goes beyond and behind mere history.

The book falls into four parts. In Part I Professor de Visscher deals with political power in its external aspects since the origin of the modern State. He traces the development of two rival conceptions of political power. First, there is the conception according to which political authority is identified with public service, and is the instrument of human purposes; this moral conception of authority is the legacy of the medieval doctrine of law. The other conception, whose acceptance in the field of international relations dates from the Peace of Westphalia, is the absolutist idea of the State as self-sufficient and unlimited, an end unto itself. In modern times this conception has been reinforced by the principle of nationality and by a group-morality which has intensified loyalty to the State at the expense of morality in its widest sense. After the First World War high hopes were entertained that this group-loyalty might be transformed into an allegiance to the international order, of which the League of Nations conceived itself to be the guardian, and for many years not without just cause. Professor de Visscher attributes the failure of these hopes in large degree to the fact that between 1920 and 1939 international law was 'En avance trop grande sur les faits' (p. 84). However this may be, none will dissent from the author's conclusion that the League marked a decisive point in world organization. It brought the organization of peace once and for all out of the realm of speculation, and made peace and its maintenance a matter of first-class political importance for all Governments. The author brings to a close the first part of his book with a brief section entitled 'Les tâtonnements de la doctrine'. He observes that, in the main, textbook writers continued, during the period between the two Wars, to expound international law by following the formal methods of the positivists, superimposing on the accepted rules the new principles arising from the establishment of the League. A few, however, attempted to re-examine critically the fundamental concepts of (and about) the law of nations, and these in practice became attached to one of the schools of thought represented either by Leon Duguit or Hans Kelsen. The remark made by Hauriou about Duguit is true of many other international jurists of the period: 'Sa préoccupation a été de supprimer le pouvoir comme source du droit.' It cannot be done. As Professor de Visscher observes, Duguit assumed as already achieved that which (vainly) was the object of his beliefs and hopes —the destruction of the sovereignty and personality of the State. These are not, as he thought, merely unnecessary assumptions of technique, to be replaced by the theory of 'droit objectif exclusivement fondé sur une solidarité sociale dont, en fait, les détenteurs du pouvoir sont les interprètes' (p. 88). The theories of Kelsen, on the other hand, aiming at the elimination of the dualism of State and law, end by identifying the State with the legal order. For Professor de Visscher the State is a social reality, and States do not come into relation with each other as 'complexes of norms'. He holds that Kelsen's normative method involves the absolute exclusion of any political element in a field where power still plays a preponderant role.

In Part II of the book Professor de Visscher considers the relations of law and power in the international field. Competition is the normal relationship of States, and politics the means through which that competition asserts itself. Political ideas are directed towards action, towards the future, the calculation of possibilities, and the estimation of the strength of rival forces. The rules of positive international law are the expression of a temporary stabilization of these forces. Tension between States becomes naturally most acute when disputes arise in which rules of law present obstacles to the realization or protection of political interests. Consequently, Professor de Visscher reasons, a particular dispute may appear as 'justiciable' in the eyes of a lawyer, whilst a statesman, without questioning its 'legal' character, views it as 'political'. Similarly a dispute may acquire a political character by reason of the inequality in strength of the parties. In both cases it is not the inherent nature of the dispute, but its subjective appreciation by the States concerned, that endows it with a political or non-justiciable character. It may, indeed, happen that a 'dispute' has no precisely defined object at all, being merely a pure conflict of power camouflaged as a difference of opinion, of which the 'disputes' engendered or manufactured by Hitler provide many examples. In such a situation there is no dispute susceptible of judicial decision, since it is not a question of opposing views stated in rational terms to be resolved by legal analysis, but of force explicitly or implicitly opposed by force, a sphere into which the law as such cannot enter. There is not a dispute 'about something' but merely a 'robber's adventure' (p. 105, citing a remark by Walter H. Page, former United States Ambassador in London). The fact that the repression of the extra-legal settlement of disputes (in favour inevitably of the strong) is generally swift and easy within the State, whilst in the international field such repression is only possible at the risk of a major convulsion, is frequently overlooked. The risk is even greater since international society has passed from mere competition—described by the author as its normal condition—into a struggle for hegemony where the domination of one or other of great agglomerations of power hangs in the balance. Political tensions on such a scale have produced a general insecurity which hinders the establishment of any general practice or continuity in the application of law. In such an atmosphere a test of strength, as manifested by the 'cold war', has replaced the judicial solution of disputes inherently susceptible of rational analysis. Governments, apprehensive of the unknown repercussions of judicial settlement, have 'turned away' from international justice.

Sombre though these reflections may be, many international lawyers, including the present reviewer, will not be disposed to question their accuracy, and will find in the concluding chapters of Part II much to engage their sympathetic assent. The author examines the meaning of 'the international community' which the 'classical' doctrine of international law presupposes. The mere fact that such a community is desirable does not prove that it exists. He points out that every social group derives its *raison d'être* from its exclusiveness; thus the modern State largely owes its social cohesion to external pressures. The international community can only appeal to a supra-national good for the sake of which national communities are called upon to submerge and sacrifice their particular interests, a process which public opinion in all countries finds difficult to accept. Within the State, social solidarity is centred upon the most vital interests of the community; in the international sphere, solidarity only exists with regard to interests of a minor or technical character, such as, for example, communications. With regard to the important question of peace or war there is no real solidarity. Moreover, whereas the enforcement of law within the State is impersonal and automatic, collective international action partakes of a highly political nature. A world which has witnessed two catastrophic wars can hardly be said to exhibit any natural solidarity; arguments based on the interdependence of peoples and the like proceed from fallacious premisses. The first step towards establishing the authority of international law is the general acceptance of a moral duty of sacrifice instead of postulating a completely fictitious community of interest. The social solidarity of the international community can only be established if political power is fully dedicated to human ends. Power itself is not the sole obstacle to such solidarity; even more obstructive is the pseudo 'higher morality' centred upon the Nation-State. The future of a truly international morality depends, in the opinion of Professor de Visscher, on the survival of personal values in a mass civilization. 'La communauté internationale est un ordre en puissance dans l'esprit des hommes: elle ne correspond pas à un ordre effectivement établi' (p. 128). It follows that he finds the source of the binding force of international law, not in jurisprudential theory, but in the moral nature of man.

The author turns to consider the relation of sovereignty to international organization. Repudiating as anti-historical all doctrines representing sovereignty as a competence delegated or conferred by international law, he prefers the view of Anzilotti: that the power of the State is juridically limited by international law but is not derived from it. Neither the Covenant of the League of Nations nor the Charter of the United Nations has altered the validity of this opinion, nor substantially affected the discretionary power of States in all that concerns their 'vital interests'; it could not be otherwise except under a federal régime. In this connexion Professor de Visscher makes the interesting comment that the supposition that all progress lies in the formation of ever greater political organizations is not necessarily correct. Federalism or world federation may well become another dogma of international organization, like so many others, based on abstract speculation instead of experience. He points to the break-up of the Asiatic continent into small political units, as happened in Europe in the nineteenth century: 'Il ne faut pas confondre les phénomènes de structure politique avec celui de la concentration de la puissance' (p. 136). This is a wise saying. It would seem prudent to await the results that may yet ensue from a paralysed United Nations rather than to push farther into unknown territory. His views on the more limited conception of a European Defence Community (which ceased to be a practical issue after the publication of this book) are, on the other hand, more likely to divide opinion.

In the third part of his book, which is by far the longest and at times the most difficult to follow, the author deals with the points of tension between law and power in positive international law. He is concerned, first, to show that the problem in fact exists, and that theories which propound the formal completeness of international law serve only to obscure this fact. There are large areas of international relations which remain outside the realm of international law, either because they lie within the domestic jurisdiction of States, or because States are unable to agree upon the content of the legal rules alleged to be applicable. Similarly, he criticizes that presentation of international law which, recognizing the absence of authoritative organs, proceeds artificially to attribute the functions of these organs to States acting as 'agents' of the international community, though it is an observed fact that States are sovereign, constantly acting in pursuit of their particular political interests. This school of thought, of which Monsieur Scelle is the most brilliant representative, conceals the contradictions of law and power by forcing them into a constitutional system manifestly incompatible with the present individualist structure of international relations. The completeness of international law, and the constitutional organizations of States into an international order of 'competences' and 'functions', are ideals to be achieved, not accomplished facts.

Accepting, however, that tensions between international law and power are realities to be faced, it does not follow that the relation of law and power is one of continual conflict. Since it is ultimately for Governments to determine not only the formulation of new rules by treaty, but the existing content of the law (except in so far as they have relinquished such determination to an independent tribunal), power plays a decisive role in the formation of international law. The influence of power on collective treaties is well illustrated by the action of the Great Powers where settlements of an international character recognized by States not parties to such treaties are involved, e.g. the régime of perpetual neutrality for Switzerland and Belgium, the status of the Aaland Islands as determined by the Treaty of Paris, 1856, &c. This influence is similarly felt where projects of codification are concerned. Where such projects are limited to a number of States sharing the same legal and social outlook or where codification is the result of a political bargain (as was the case with the Declaration of Paris, 1856, on the subject of the maritime laws of war) it is more likely to be successful than projects intended to be universal and proceeding on the basis of generalizations. It may be doubted whether Professor de Visscher, whose observations on this subject scarcely do justice to its importance, has fully developed his thought in this context, or really placed his finger on the difficulties which surround it. Thus, the Hague Codification Conference of 1930 not only revealed disagreement as to what the law was, but as to what it should be. Nor is it easy to accept without qualification his assertion that every international custom is the result of power (p. 183). Many of the rules of the law of the sea, in peace and war, owe their origin to the sea power of Great Britain, and, at a later date, that of the United States. Nor were these rules entirely forced upon an unwilling international community, since weaker States, and especially non-maritime Powers, were content to allow such predominance in return for the benefits to be derived from the maintenance of order on the high seas. Other customary rules, such as those relating to diplomatic immunities, owe their origin to different considerations, and power cannot be said to have played an important part in their formation. Again, the law relating to the responsibility of States is almost entirely the product of arbitral jurisprudence, which has developed since the nineteenth century; here again the influence of power has been comparatively slight (as the author himself admits later, at p. 346).

The author is on safe ground in attributing a major role to the influence of political power in the creation and extinction of States; more controversial is the precise role of international law in this sphere. No doubt it is true that the law does not create States; it presupposes their existence (p. 207), but what is the meaning of 'existence' in law? Does the frequent artificial creation of States as buffer-States or protégés give recognition so accorded an exclusively political character? It is not clear what answer to this question he would wish us to infer from the decisions of the Concert of Europe, acting 'in the general interest' in creating such States; he seems to distinguish, not very effectively, between those creations which were 'unreal' (including apparently the Baltic States) and those which were not. In a brief section devoted to international recognition (pp. 277–90) Professor de Visscher distinguishes, also, between the objective and subjective aspects of the recognition of States; objectively, recognition declares the existence of a State in international law, subjectively it implies that the conditions under which a State came into existence did not violate the rights and interests of the State granting recognition. Of the latter (its interests) only the recognizing State can be the judge; and here its decision is manifestly political. But the author holds (p. 278) that there is no general practice accepted as law, in the sense of Article 38 of the Statute of the International Court of Justice, according to which there is a duty to recognize a

'State' fulfilling the criteria normally laid down for statehood. On the other hand, he holds that political considerations are 'less admissible' with regard to the recognition of States than with regard to the recognition of Governments, which, in his view is legally declaratory, but politically constitutive. The recognition of the People's Government of China by the United Kingdom and its non-recognition by the United States were, he says, politically motivated, each from a different point of view. A further illustration of the highly political character of the recognition of Governments lies in the decisions of the municipal courts of some States attributing legal effects to the acts and legislation of Governments not recognized by the executive authorities of those States.

Space does not allow in this review of adequate comment on the wide range of topics surveyed by the author in this stimulating part of his book. Amongst the matters examined are human rights, the territory of States, international rivers, treaties (including the problem of reservations to multilateral conventions), the continental shelf, and the perennial question of domestic jurisdiction. Indeed, there is no question of political importance that he does not touch upon. Possibly the author has taken a too comprehensive sweep; and it may be thought that a fuller development of his ideas on a more restricted choice of topics would have been preferable. Nevertheless, the impression created is a powerful one. The author concludes this part of his book with a discussion of the recourse to force in international relations. He considers the limitations imposed on reprisals by treaties to have been primarily due to the rivalry of the Great Powers, but remarks that they will remain politically possible until replaced by collective action. He deplores purely verbal attempts to circumscribe aggression as more likely to assist the aggressor than the victim.

Part IV is devoted to the judicial settlement of disputes. Professor de Visscher finds significant the scrupulous care with which the International Court of Justice, like its predecessor, bases its jurisdiction upon the consent of the parties. It has been less concerned to enlarge its jurisdiction than to establish it upon a firm basis. The maxim *boni judicis est ampliare jurisdictionem* has not been the policy of the Court. The Court has conceived it to be its duty to respect sovereignty without allowing the law to become subordinate to sovereignty. For this reason the author deplores all the more those reservations to the Optional Clause whereby States make the jurisdiction of the Court depend upon the sovereign appreciation of Governments. Those who place faith in judicial legislation as a means of reforming international law and bringing it into conformity with modern conditions, receive little support from Professor de Visscher. International law does not, in his view, permit the extension by analogy of rules restrictive of sovereignty, and peaceful change is a political, not a juridical, process. 'La mission de la Cour est de dire le droit non de le créer' (p. 429). Governments have, therefore, been wont to look to the Court as a promoter of legal stability, and the Court's constant concern for the building up of a homogeneous body of jurisprudence justifies this view of its function.

J. M. J.

Traité de Droit international public, avec mention de la pratique internationale et suisse. By PAUL GUGGENHEIM, with the collaboration of Denise Bindschedler-Robert. Geneva: Librairie de l'Université, Georg & Cie S.A. 1953. 2 vols.: xxvii+592 pp., xv+592 pp.

The German version of these two volumes was reviewed in this *Year Book* for 1950 by Dr. Hambro, who noted its exceptional lucidity—a quality of the work even more manifest in this French text. The two volumes contain a masterly exposé of the system of the law of nations from the standpoint of a disciple of the pure theory of law. For Professor Guggenheim is as far as possible from being a naturalist, and it is incidentally interesting to see that he is apparently discontented with the maxim *pacta sunt servanda* as the *Grundnorm* only on the old ground that it will not support the structure of customary international law. Concerning that branch Professor Guggenheim, much as Professor Ago, has something approaching a theory of his own which involves the diminution of the significance of long usage and the relegation of the practice of States to the role of *travaux préparatoires*. He subsumes, too, the 'general principles of law'—or rather the rule that they may be applied by way of analogy—under the head of customary law.

This philosophical approach materially influences the arrangement of the work—one might almost say works, for here are two books rather than 'volumes', each with its chapters and pages separately numbered, without any such sub-titles as 'Law of Peace' and 'Law of War'. In the first volume there are seven chapters, the first two containing comparatively short disquisitions on the foundations of international law and its relation to municipal law. There follows a long chapter on sources, most of which is taken up with a detailed, or comparatively detailed, exposition of the law of treaties with particular reference to Swiss practice. But the two pages devoted to treaty-making capacity tell the student in effect no more than that treaties may be made by sovereign States, by countries of the Commonwealth and by certain 'communautés interétatiques', including the United Nations. He must possess his soul in patience in order to learn in what respects, if any, the countries of the Commonwealth differ from sovereign States. He will, however, find such answer as is vouchsafed in the chapter next following, entitled 'Le domaine de validité personnel du droit des gens'—i.e. subjects of international law. But when he does so he may be tempted to think that it is carrying the Swiss approach to things too far to assign both the Commonwealth and the United Nations to Head B—'Les sujets de droit international créés par traité,' sub-head 3—'Les fédérations internationales'. Certainly this arrangement involves so many qualifications and saving-clauses in the definition of, for instance, a federation, that one wonders if it merits being maintained. For all that, the chapter deals wholly adequately with various phenomena, including, it may be noted, entities recognized as belligerents or insurgents, Governments-in-exile, and N.A.T.O. and the like, and devotes special attention to the position of the individual. It is followed by a no less magisterial chapter surveying 'Le domaine de validité territorial de l'ordre juridique international'. Then State succession—or rather 'Le domaine de validité de l'ordre juridique international dans le temps'—is assigned to a separate, brief chapter. The volume concludes with an account of the organs of the law—Heads of States, foreign ministers, diplomatic and consular envoys, and the organs of international organizations.

The theme of the second volume is indicated by the title of the first chapter therein—'L'acte international illicite . . .'. It opens, under that heading, with a penetrating discussion of individual and collective responsibility. Then follow chapters on, respectively, judicial and political settlement. There is then a special chapter on international execution, and the rear is brought up with chapters bearing the more traditional titles of the Law of War and Neutrality. Naturally enough, the last chapter deals in detail with the permanent neutrality of Switzerland, and it contains much of great interest on the expedients adopted by that country during the Second World War in order to preserve her traditional status.

Both volumes are embellished with a wealth of bibliographical references. These have, however, been selected primarily, it would appear, with an eye on the linguistic and library resources of Swiss students, for whom the work is principally intended. There are thus abundant references to works in French and German. One may note among these the great prominence given to the Hague *Recueil*, and the mention of some doctoral theses of which the non-Continental reader will be glad to know the names at least. But references to works in English, apart from this *Year Book*, the *American Journal*, the *Annual Digest*, and the *Harvard Research*, and other than the writings of Professor Kelsen and Judge Lauterpacht, are less prominent. This circumstance, and the manner in which the author's philosophical approach is allowed to dominate his arrangement, underlines for the Anglo-Saxon reader that this is a different kind of book from that to which he has become accustomed. This is no Swiss *Hyde*, despite the considerable and useful emphasis upon Swiss sources and Swiss practice. This is no product of the Age of the Abridgement, in which no school is followed too rigidly lest comprehensiveness suffer. But here is a worthy exemplar of a great continental tradition, and one can think of no more refreshing up-to-date introduction to that tradition for the English-speaking graduate student.

CLIVE PARRY

International Law Association, *Report of the Forty-fifth Conference*, 1952. Published by the Association. 1953. cxxviii+317 pp.

This volume contains a report of the Forty-fifth Conference of the International Law Association, held at Lucerne in August and September 1952. So far as the adoption of resolutions was concerned, the Conference was not a particularly notable one. But there were many interesting speeches and written contributions, and the volume is generally useful in that it contains much interesting material on modern international law not easily found elsewhere.

The most important Resolution adopted was that relating to State immunity. It provides that 'foreign States should not be immune from suit in relation to their acts when engaged in private enterprise'. It is inspired by the same spirit, therefore, as that which inspired the Resolution adopted by the Institute of International Law at Aix-en-Provence in 1954. But in neither case is it clear how an act performed by a State 'when engaged in private enterprise' is to be distinguished from an act performed by a State in its public or sovereign capacity. The Resolution of the International Law Association does, however, suggest various 'methods of improving the present operation of the rule of immunity'. These include (i) the creation of 'special international tribunals for the settlement of disputes arising out of activities of a 'private law' (*droit privé*) nature between themselves and foreign individuals, it being understood that direct access to those tribunals would be allowed to private parties without their claims first being espoused by their respective Governments'; (ii) the regulation by States in treaties of the limits of the immunities which each may claim in the courts of the other; and (iii) a more extended use of arbitration to settle disputes arising out of contracts between the Government of one State and the nationals of other States. These are useful suggestions, even if they are not in all respects original. In particular, the proposal that private parties should be allowed to conduct cases before special international tribunals is probably an improvement upon Sir Cecil Hurst's famous suggestion, made in the 1925 volume of this *Year Book*, that there should be established an 'international court of piepowder'. For to Sir Cecil, writing thirty years ago, it was apparently axiomatic that 'international litigation must necessarily be conducted in the name of the governments of the States concerned and under the control of agents who represent them'. But it is submitted that it is useless to make the hallowed distinction between *droit public* and *droit privé* the basis of any attempt to solve the problem of immunities in modern international law. Many Governments do not even admit the existence of *droit privé*. And even where the existence of *droit privé* is admitted, there is a multitude of different opinions concerning the point where the line should be drawn between *droit public* and *droit privé*.

The Conference carried further some valuable work on international company law. Part of this work related to the perennial problem of 'the determination of the personal law of companies and of the matters governed by the personal law' and also to the question of the law applicable to corporate liability both in contract and in tort. These questions were recommended for further study. The other part of the work related to the more novel problem of 'international companies', which it is proposed to call in future 'supranational companies'. Here there was a marked division of opinion between those who favoured creating a special status under international law for such companies and those who, while recognizing the need for Governments to make in appropriate instances special treaty arrangements concerning the activities of certain companies, considered more drastic changes unnecessary and utopian. There was also disagreement as to whether 'international companies' can be said to exist today in any legal sense, some speakers being sure that they did and others being equally sure that they did not. All were agreed, however, that the question was an important one which deserved further study. A particularly interesting contribution was that by M. Leo Fromer explaining Swiss practice in regard to the registration of companies under Swiss law.

There was a brief discussion on the problem of the continental shelf, and the volume contains an extract from the Award by the late Lord Asquith of Bishopstone in the *Abu Dhabi Arbitration*. It is now generally recognized that this question, and related maritime problems, are peculiarly within the province of the International Law Commission. It is therefore perhaps all the more gratifying that at Lucerne Dr. Yuen-Li Liang, Director of the Division for the Development and Codification of International Law of the United Nations, took the opportunity of praising the International Law Association for the assistance it had given in this and other fields to the International Law Commission and the United Nations generally. Dr. Liang's interesting speech would well repay study by those who are inclined to doubt the value of the part played by learned societies in the development of international law.

The general debate was on the wide and difficult question of 'Sovereignty and International Co-operation'. It elicited, however, a remarkably sage and balanced opening address by Dr. J. A. van Hamel, as well as an impressive analysis of the problem along 'realist' lines by Professor Karl Loewenstein. Both these speeches deserve to be widely read.

D. H. N. Johnson

The Development of International Justice. By Sir Arnold Duncan McNair. New York: New York University Press. 1954. 34 pp.

This little book consists of two lectures delivered at the 'Law Center' of New York University in December 1953. The first is a brief history of international tribunals from the Jay Treaty to the International Court of Justice. The second is an account of the principal methods of developing the law—by decided cases, by conventions, and by restatement. In the main the lectures are expositions of material already familiar to international lawyers; but Sir Arnold also permits himself some comment on a number of important and controversial topics. These comments are brief and offered with the caution that is at once characteristic of the author and necessary to one who was at the time President of the International Court; nevertheless, these cautious and tentative asides are extremely stimulating and are bound to carry great weight, coming as they do from one so experienced both in the law and in the actual work of international courts. It will be best to consider these comments in turn as they appear in the lectures.

First there is the question of Article 34 of the Statute of the International Court of Justice, the Article which provides that only States may be parties before the Court. The Article may of course be supported on solid grounds of convenience, however objectionable it may appear in the light of modern doctrine; but it must be admitted that it looks very odd now that the Court itself has decided that the United Nations is competent to bring certain claims in the international sphere. However, the United Nations and many other international organizations can in many cases get before the Court by the indirect method of the advisory jurisdiction. The more difficult question is concerned with the position of the private individual claimant. Even he may get a showing if his Government presents the claim as its own. 'The claim is thus transformed from a claim dependent on some system of national law into a claim involving a question of international law.' But is it desirable that the private claimant should be enabled to bring a claim against a foreign Government before an international tribunal as of right and without the intervention of his Government?

However attractive this may seem from the point of view of human rights, says Sir Arnold, it must be remembered that claims of this kind may excite national feelings between two States, and 'I submit that an individual uncontrolled by his Government ought not to be allowed to make that possible'. Therefore he goes on to suggest that, if any such new jurisdiction were to be created, the individual claimant's own Government 'ought to be in a position to give or withhold its imprimatur'.

At first glance this suggestion does not seem to carry matters much farther; for under the traditional law, too, the individual has to approach his Government and persuade it to back his claim. Further examination, however, shows that this seemingly innocuous suggestion of requiring a governmental imprimatur for individual claims has far-reaching possibilities. For, whilst conceding the need for governmental supervision, it admits by implication that the individual is himself competent in international law and that he is the true subject of the claim; no longer is the claim that of the Government, with the individual as the mere object of it. How would this position be affected by the rule of the nationality of claims? If the question is asked which Government, if any, is competent to give the imprimatur to an individual claimant, do we have to answer that question by reference to the rule of nationality of claims? It would seem not, for that rule is directed towards the claims of States, not the claims of individuals. Indeed, the suggestion of the imprimatur procedure might well be a shrewd blow at the tiresome absurdities of the traditional rule of the nationality of claims. All the same, it would be interesting to know what Sir Arnold had in mind about the stateless person who wishes to bring a claim before an international court. Having no State, would he be left remediless for lack of a governmental imprimatur? On Sir Arnold's reasoning it would seem to follow that the stateless person would have no need of a governmental imprimatur; for *ex hypothesi* the stateless person's claim cannot cause national feelings between two States, for he involves no State in his behalf; but if that be so, then the stateless person is better off than the national, which seems absurd. Whatever answers might be given to these questions, it is clear that the suggestion of relegating governmental intervention to the realm of procedure and taking it out of the substance of the claim offers a very fertile approach to the whole problem of the nationality of claims; though it must be admitted that the recent decision of the International Court in the *Nottebohm* case is hardly a step in that direction.

On the question of *ad hoc* Judges in the International Court of Justice the President is naturally more than cautious. He contents himself with pointing to the familiar argument that the abolition of the right to appoint *ad hoc* Judges carries the implication that regular Judges bearing the nationality of one of the parties ought not to sit in the case; and that States might not be prepared to appear before tribunals entirely foreign. He leans against this conclusion, arguing that States have often in the past litigated before tribunals consisting entirely of foreign arbitrators. One cannot help reflecting that the rule that Sir Arnold seems by implication to favour—that national Judges ought not to sit, whether regular or *ad hoc*—would have deprived us of some of the most valuable judgments of the author himself and would have rendered the jurisprudence of the Court very much the poorer. Moreover, if one does occasionally seem to detect nationalistic bias, it is not by any means always in the attitude of national Judges. Surely the fact of the matter is that nationality is irrelevant, and that the conclusion to be drawn from that proposition is that regular national Judges ought to be allowed to sit and that *ad hoc* national Judges ought not to be appointed?

The second lecture begins with a pæan on the excellence of case law; and indeed the author is justified, for the growth of case law during this century has wholly transformed international law. Its elaboration and refinement in decided cases has lent it an authority and a usefulness which make it of a quite different order of law from those simple textbook propositions of less than a century ago, often rudimentary to the point of naïvety. But case law cannot live without reports, and attention is rightly called to the importance of the *Annual Digest and Reports of Public International Law Cases*; and although Sir Arnold omits all mention of his own part in the foundation of it, it is right that it should be mentioned here. It would be difficult to find any other single publication in modern times which has had so profound and salutary an effect upon the development of international law.

A footnote to this section on case law is interesting. It reminds us that case law is best in those countries where 'the judge, subject to due restraint, participates in the argument between counsel'; and this is described as 'a very precious aid', which most international tribunals deny themselves. Anyone with even a slight acquaintance with the working of English courts knows how true this is. The participation of the Judge in the argument serves to knit the decision with the case presented by the parties, and helps to avoid the feeling one has so often with judgments—particularly the majority judgments—of the International Court of Justice, that however admirable they may be as essays in the law, they frequently do not answer, and occasionally do not even mention, some of the arguments actually presented by the parties. This must weaken the usefulness of the precedent. Of course it is obvious that one cannot have fifteen Judges interrupting counsel, but it ought not to be impossible to discover a procedure by which at some convenient point in the proceedings the Court might ask questions of counsel.

On the question of codification Sir Arnold is very much of what might be called the traditional English school. He warns of the dangers of actually undermining the authority of the law by attempted codes; especially where questionnaires are sent to Governments, so that what had been a tolerably well-established rule may easily be submerged in a welter of differing replies dictated by national interests rather than by scholarly or scientific considerations. For this reason he is suspicious of codification by convention, but is much attracted by the restatement method so strongly advocated by Sir Cecil Hurst.

Certainly the history of codification in international law has not hitherto been a very happy one; but your reviewer is inclined to wonder whether Sir Arnold is not unduly pessimistic about the prospects of codification and development by convention. Of course, if codification is used in the strict sense of an attempt to write down existing law in the form of a convention it may readily be admitted that the process involves all the dangers which cause the learned author so much concern; moreover, it seems a somewhat pointless proceeding, for if the law is already certain enough to admit of consolidation there is little to be achieved by merely changing its form. However, codification in the larger sense—the sense in which it is used in the Statute of the International Law Commission—is quite different from this strict process of consolidation. Codification and development are inseparable. Almost any successful code will include a proportion, more or less, of obviously new rules. For the rest it will comprise rules which some will regard as the same as the old law and some will think altered. However much or however little a codification convention draws upon the existing materials, it ought properly to be regarded as a proposal for new legislation; which indeed is what it is. Once this is seen, the supposed dangers of codification by convention largely disappear; for if one is dealing with proposals for a new convention it is only to be expected that views will differ about its proposed content. Those opposing views, however, are no longer an attack on existing law, for they are directed *de lege ferenda*. Codification by convention is certainly difficult to achieve; but it is submitted that the dangers supposed to be inherent in it are easily exaggerated.

On the other hand, all those dangers are certainly present in the restatement method; for here the endeavour is by definition confined to an attempt to state existing law; and to approach Governments with questions about their views on existing law is obviously dangerous. It is a curious thing that English lawyers of late, however suspicious of codification, have so often been prepared to swallow the strictest and narrowest kind of codification whole as soon as it is called a restatement; and this even though restatement is by definition confined to that aspect of codification which past experience has shown to be fraught with danger.

This is not, of course, to disagree with Sir Arnold's advocacy of the restatement method when it is in the hands of strictly scientific bodies; the volumes of the *Harvard Research* long since put this beyond question. But restatement is perhaps best kept away from Governments and left to the Universities.

It has only been possible to mention a selection of the topics raised in these two lectures; but enough has been said to show that they are immensely stimulating. It is hardly necessary to add that they are also in that felicitous style which characterizes all the author's work.

R. Y. J.

Identity and Continuity of States in Public International Law. By KRYSTYNA MAREK. Geneva: Librairie E. Droz. 1954. 613 pp.

This learned and useful, though occasionally somewhat argumentative, monograph is truly international in character in that it is written by a lady who is apparently of

Polish origin and works in Geneva but writes in the English language. It is devoted to an important problem of international law, the clarification of which is of considerable practical interest, but made difficult by the fact that it involves so many different aspects and principles of law. It required courage to tackle so intricate a subject, but the author is clearly blessed with that quality, as is shown by her tendency to submit 'earnestly' (p. 88), to believe 'firmly' (p. 365), to have 'no doubt' about the accuracy of her conclusions (p. 236), to regard 'no other conclusion' as possible (p. 262), to treat a particular view as 'utterly devastating' (p. 281) or as 'final and incontrovertible' (p. 330), and so forth.

The most valuable parts of this work lie in the collection of material relating to nine case histories: Italy, Austria (after 1918), Yugoslavia, Ethiopia, Czechoslovakia, Albania, Austria (after 1938), the Baltic States, and Poland. One of the most interesting recent cases on the problem of succession or identity, viz. that of Germany after 1945, is ignored, as are also the very numerous (though mostly disappointing) judicial decisions which have been rendered in recent years by West German courts on some of the very questions discussed in this study and which have been accompanied by extensive academic contributions to German legal periodicals. The author's conclusions, which are frequently opposed to those generally accepted, are derived from five rules: Where there occurs merely a territorial change (as in the case of Italy) or an internal revolution or belligerent occupation (as in the case of Ethiopia and Poland between 1939 and 1945), the identity of the State is not affected. Succession rather than continuity occurs 'when the entire international delimitation of the State breaks down, that is to say, when its legal order becomes displaced and when, in addition, there is either an internal breakdown of the territorial and personal delimitation, or an extension into the original State territory of the legal order of another State' (p. 188), as in the case of Austria in 1918 and Yugoslavia. In a last group, comprising Czechoslovakia, Albania, Austria (after 1938) and the Baltic States, the identity and continuity of the State is assured by the maxim *ex injuria jus non oritur*, while Poland after 1945 presents to the author's mind a very special problem predicated upon the 'clear violation of general international law' which is alleged to be inherent in the decision taken at Yalta.

Habent sua fata praecepta. In 1937 Judge Lauterpacht first formulated the rule *ex injuria jus non oritur*: *Hague Recueil*, 62 (1937), p. 287. Dr. Marek wrongly attributes it to Professor Guggenheim (p. 328) who took it up in 1949: *Hague Recueil*, 74 (1949), pp. 219, 226. It may indeed be a 'fundamental rule of any legal system' (p. 328), but its existence, historical basis, dogmatic accuracy and delimitation require much further investigation. The author, who does not shrink from ample discussion of many cognate problems, such as recognition of Governments-in-exile, has dealt a little cursorily with what certainly is a fundamental question and, probably, a fundamental principle.

F. A. MANN

Einführung in die allgemeinen Lehren des Internationalen Privatrechts. By WERNER NIEDERER. Zürich: Polygraphischer Verlag. 1954. 405 pp.

This is a book on the general principles of the conflict of laws written by a distinguished Swiss lawyer who is both a practitioner and an academic teacher. Its object is not to develop new theories but to 'introduce advanced students and lawyers who only occasionally come across questions of private international law into the general principles of private international law and to supply them with a survey of the present condition of the theory' (p. 7). Accordingly, this volume contains a discussion of the fundamental problems of the conflict of laws, which no country has as yet succeeded in solving. Although the work is written with an eye to Swiss law, it is based on a broad comparative approach. It discloses such wide knowledge, such judicious argumentation, and such precision of formulation that everywhere the expert will derive much benefit and pleasure from studying Professor Niederer's work.

The readers of this *Year Book* are likely to be particularly interested in what the learned author says, under the heading of 'the nature of private international law', about the relationship between public and private international law. He reaches the conclusion (p. 143) that

> 'private international law, in so far as we contemplate its task, is public international law, but in so far as we consider its origin, is municipal law. The theoretical and practical problems of the conflict of laws can accurately be solved only if the dual nature of these rules is taken into account: where their spirit is involved, they are public international law, where their existence is in question we treat them as municipal law.'

It follows that it is incumbent upon the judge who has to construe a conflict rule, and upon the teacher who has to develop it, to seek guidance in the supra-national purpose of the conflict of laws (pp. 145, 146). However, this view also determines the solution of specific problems such as the definition of domicil (p. 169), the problem of classification which, in accordance with the supra-national object of the conflict of laws should be solved autonomously, i.e. independently of the *lex fori* (p. 169), or the doctrine of renvoi (p. 274).

Although, as has been pointed out, the author does not, in general, aim at originality, his work includes many passages which disclose a refreshing and challenging novelty of approach. Thus Professor Niederer accepts, of course, Savigny's unanswerable criticism of the conception of vested rights (pp. 316 ff.). He proceeds, however, to point out that the theory of vested rights performs a useful function if it is regarded as 'an amplification of *ordre public*'. Just as *ordre public* sometimes demands the non-application of a *lex causae* which would normally be applicable, so the doctrine of vested rights sometimes requires the application of a *lex causae* which, strictly, is inapplicable. This may occur when 'a legal relationship has become effective' and it would be inconsistent with justice to disregard it (p. 321). The following example is given: The illegitimate child of parents of British nationality becomes legitimated by the law of France where all parties are resident and live for many years. An Italian judge is called upon to pronounce upon the validity of the legitimation. Under his conflict rule he has to apply English law by which the legitimation is invalid. Yet he should treat the French legitimation as a vested right, 'for the non-recognition of the legal condition created in France would, after many years of effectiveness, be so contrary to a sense of justice as to be unbearable' (p. 322). This is an allusion to the interesting idea of the acquisition of a vested right by prescription. The attentive reader will find in Professor Niederer's work many other observations which will stimulate thought and further research.

F. A. MANN

International Law. By L. OPPENHEIM. Volume I (Peace), Eighth edition by H. LAUTERPACHT. London: Longmans, Green & Co. 1955. lvi+1072 pp. 90*s*.

In the Preface to the eighth edition of this standard work the learned Editor points out that the sections written by the original author now comprise only one-third or less of the total contents, that even these sections have undergone substantial changes, and that, for these reasons, it has frequently been suggested that the Editor himself should assume full responsibility, under his own name, for a treatise on international law. 'I hope, in due course and subject to other calls, to comply with these wishes.' It thus seems that this may be the last edition of 'Oppenheim' for which its present Editor will take the responsibility. It can only be hoped that the relinquishment of the Whewell Professorship and the assumption of judicial office will not prevent him from giving effect to this intention, which he at present expresses so diffidently.

These plans account, perhaps, for the fact that the changes made in the new edition of 'Oppenheim' are not as far-reaching as might otherwise have been the case. One notices many revisions not only of the bibliographies, but also of the text (see, particularly, §§ 36, 155*b*, 340*f* to 340*gh*, 539, and pp. 877, 889, 890, 912–15). Much new material has been added, though there are omissions: thus on pp. 39 ff. a reference to *Théophile* v. *The Solicitor General*, [1950] A.C. 186, 195 *per* Lord Porter, would have been useful; on p. 6 the second edition of Wolff's *Private International Law* and on pp. 553 and 798 the sixth edition of Dicey's *Conflict of Laws* ought to have been considered; § 79 still ignores the difficult case of Austria after 1938; § 75*f* could conveniently have been expanded in the light of the two very important recent decisions mentioned on p. 150, n. 1. There is probably room for the view that, taken as a whole, 'Oppenheim' has reached a point of development at which re-editing, however extensively combined with re-writing, is no longer sufficient. There is need for an altogether new treatise which will present a new approach to the modern law of nations, its problems and its literature.

However, the new edition involves substantial changes of a twofold character. On the one hand, the work now includes an Appendix of 52 pages, for which Dr. C. W. Jenks is largely responsible, and which gives an account of Specialised Agencies of International Co-operation and Administration under three headings, viz. Health and Education; Agriculture, Trade and Finance; Transport and Communications. This Appendix is substituted for the former Appendix A, which merely contained a list of the more important general Conventions of a non-political character with a bibliography. On the other hand, the Editor has added or substantially re-written approximately twenty-five sections, and since, contrary to his earlier practice, he does not himself indicate them in the Preface, it may be helpful to enumerate them here: they are those numbered 37 (Codification), 73*d* (Recognition of Governments and Representation in the United Nations), 84*a* (Succession in International Organisation), 89*a* (Federal Structure and International Law), 89*b* (certain Federations and Associations of States), 115*ab* (Limits of Recognition of Foreign Legislation), 115*ad* (Immunities and International Law), 167*a* (Specialised Organs of International Administration), 167*aa* (International Organisations and International law), 285*a* (Regulation of Whaling), 285*b* (International Regulation of Fisheries), 287*d* (Continental Shelf), 298*a* (Citizenship within the British Commonwealth), 340*m* to 340*r* (various aspects of Human Rights), 390*a* (Diplomatic Asylum), 390*b* (the *Asylum* Case), 391*a* (Waiver of Immunity), 494*a* (Treaty-making Power of Organisations of States), 508*a* (the Existence of Legal Obligations in connexion with Treaties), 518*a* (Acceptance of Treaties).

In the circumstances, those who are familiar with the previous edition of 'Oppenheim' will primarily direct their attention to the new parts included in the eighth edition. They will find that these parts display all the characteristics and qualities which distinguish Judge Lauterpacht's work in general and his contributions to 'Oppenheim' in particular. Thus tribute must again be paid to his outstanding sense of responsibility, which leads him not only to formulations both cautious and full of respect for the sanctity of law, but also to a conscious differentiation between what it is open to him to say in the pages of 'Oppenheim' and what he may put forward in another place. His views on codification as expressed in the *American Journal of International Law for 1955* are alluded to, at pp. 64 ff., in the most guarded language. On the question whether the People's Republic of China ought to be allowed to represent China in the United Nations, the operative sentence reads as follows (p. 134): 'Principle would seem to demand that a purely nominal authority, albeit continuing to be recognised as a State by a number—or majority—of the Members of the United Nations, is not entitled to represent the State in question.' The somewhat controversial theories on sovereign immunity which the learned Editor suggested in the year 1951 in this *Year Book* are reflected, at p. 274, by the unassailable statement that 'it is not certain whether—and to what extent—the question can be regarded as affirmatively regulated by International Law'. On the Continental Shelf, 'Oppenheim–Lauterpacht' merely submits that the geographical notion of the Continental Shelf 'has now become widely accepted and is believed to express accurately the notion of coastal submarine areas as constituting the natural seaward extension of the territory of the State' (at pp. 633, 634). On the question of reservations to treaties, discussed by Judge Lauterpacht in *Transactions of the Grotius Society*, 1954, his view as expressed in 'Oppenheim' is that, 'while the Opinion [of the International Court of Justice in the *Genocide* Case], fails to provide a workable legal rule, it gives expression to the view, which is gaining ground, that the principle of unanimous consent to reservations is not well-suited to the requirements of international intercourse characterized by multilateral conventions of a general character . . .'. In his *Report on the Law of Treaties* Judge Lauterpacht, as the International Law Commission's Special *Rapporteur*, stated (p. 25) with reference to the question whether a document reserving rights of decision to a contracting State involved the intention to create legal rights and duties: 'Such determination must take place in accordance with the implied obligation to act in good faith.' On the other hand, in the words of Oppenheim's Editor, 'in such cases, it is believed, the determination of the extent of the obligation of a State. . . . must take place in accordance with the legal duty to act in good faith' (at p. 900).

The legal world will be grateful for this new version of 'Oppenheim'. It is an imposing and excellently produced work which will continue to hold the field and which, for years to come, is unlikely to be displaced by anything except its present Editor's own version.

F. A. MANN

Principî Generali di Diritto e Processo Internazionale. By ANGELO PIERO SERENI. Quaderni della Rivista di diritto internazionale, vol. I. Milan: Dott. A. Giuffrè. 1955. 98 pp.

Professor Sereni, who is equally at home in the systems based on civil law and in the common law, examines whether general principles of procedure and evidence can be said to exist which are applicable in international courts. In a brief introduction he observes that international tribunals have often relied on principles of procedure and evidence analogous to those recognized in domestic law. At the same time he warns the reader that these were often rules common to both parties, and that what he calls 'provincialism' encourages a tendency towards regarding familiar rules as universally valid. In accordance with the conclusions of the late Professor Gutteridge (this *Year Book*, 21 (1944), pp. 1–10) he proceeds from the assumption that there are only few generally recognized principles of domestic law and realizes, further, that these are relevant in international law only in the absence of autonomous rules of international law and only if they are capable of forming part of international law. This latter reservation overlooks that a common practice may well create an international standard, the violation of which may lead to State responsibility, even if the common practice is not suited for adoption by international tribunals. This aspect of the question is not treated by the author. Instead he examines, first, whether any common principles exist, and, secondly, whether these principles have been, or are capable of being, adopted by international tribunals.

An analysis of the rules of procedure and evidence in the two leading legal systems of the world, the common and the civil law, brings out as a salient feature that rules of procedure and evidence have little or no material content, although they may be historically explicable and logically necessary for the proper working of the courts in a particular country. The characteristics of the common law procedure are set out briefly, but the author achieves his aim, which is to stress the importance of the jury for the rules as a whole, resulting in the typically English form of pleadings, the oral trial, the preference for witnesses rather than for documentary evidence, and the loose relation between judge and parties. The specific nature of the civil law procedure is touched upon only in so far as it is necessary to show where it differs from the common law. The author then turns to the procedure of international tribunals. He believes, contrary to the prevailing notion, that the common law system of pleadings may in certain circumstances operate to the advantage of the party relying on it, but holds, rightly, that it is not normally useful, seeing that it is necessary on occasions to establish the existence of customary rules of international law before they can be applied. Moreover, the *compromis*, rather than the pleadings, often determines the issue, including the question what law is to apply. And since the tribunal operates in virtue of the consent of the parties, it is endowed with the power to determine its own procedure. The author seems to overestimate the tendency of international tribunals to assert wide powers to order the production of evidence and to investigate facts. In the only instance to which he refers—the *Serbian Loans* case—the Court ascertained rules of domestic law *proprio motu*. His approval of this alleged tendency, and of the right to admit new evidence, fails to take into account that the production of new evidence during the trial may lead to the need to re-open the pleadings, and may not only justify permission to the other party to produce new evidence in return. His assertion that the importance of the submissions by the parties is small and that before international tribunals the collaboration between the parties and the court is greater than in domestic courts is also open to question. However, he is probably right in stressing the high standards which are required of and observed by States appearing before international jurisdictions. None of these practices represents general principles. Nor can it be said, as the author points out, that the doctrine of *res judicata*, the principle of equality and the right of the court to ascertain facts, are the counterpart of such principles. They follow either from the submission to the jurisdiction or they result of necessity from the nature of international proceedings. Indeed, the author concludes, with justification, that the structure of international tribunals and of international proceedings excludes the reception, as such, of domestic rules of procedure and evidence. The paucity of cases and their unique nature reduce the need for strict regard to formalities. The result, foreshadowed earlier in the book, is thus negative, but this was to be expected. Rules of procedure and evidence are formal, without a material content. The procedure of international tribunals is either autonomous, or it is determined in the *compromis*.

It precedes the application of the substantive rules of international law and does not form part of them. But the question remains to be solved whether the laws of procedure and evidence in the countries which form part of the international community have contributed to create, in substance although not in form, certain common standards which cannot now be transgressed with impunity.

K. Lipstein

An Introduction to International Law. By J. G. Starke. Third Edition. London: Butterworth & Co. (Publishers) Ltd. 1954. xx+485 pp. 32*s.* 6*d.*

The second edition of this work appeared in 1950. The additional matter in the third edition (which is some 90 pages longer than the second) reflects the considerable developments in certain topics of international law during the intervening years. New sections have been added on such matters as Asylum, Human Rights and Fundamental Freedoms, International Tribunals and the Operation of Municipal Law, and Economic Warfare and Blockade. The learned author in his Preface states that the text of certain chapters has been revised 'in accordance with the emergence of new concepts and principles'. He gives as an example 'the revolutionary impact upon the law of the territorial sea' of the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case, although whether the effect of that judgment is indeed 'revolutionary' may yet have to be seen. Mr. Starke has, however, undoubtedly found new concepts and principles to consider in his Chapter 15, which in the second edition was headed simply 'War', and is now headed 'War, Armed Conflicts and Breaches of the Peace', to cover the enforcement action of the United Nations in the Korean conflict of 1950–3. Similarly, his Chapter 16 on 'Neutrality' has now been expanded to include 'Quasi-Neutrality', a term which he uses to describe 'the status of non-participation by States or non-State entities in a "non-war" armed conflict'.

The work claims to be an attempt to supply the needs of intending international officials (the author was formerly a member of the Legal Section of the Secretariat of the League of Nations), diplomatic recruits and university students, and its approach to international law is in fact practical and almost utilitarian. Mr. Starke therefore devotes comparatively few pages to the history of international law, to the various schools of thought or to conflicting theories on the topics with which he deals. He points out, with some truth, that 'Actually by far the greater part of international law is not concerned at all with issues of peace or war' and that 'in practice, legal advisers to Foreign Offices and practising international lawyers daily apply and consider *settled* rules of international law dealing with an immense variety of matters' (at p. 15). Mr. Starke therefore applies himself to the enunciation, in simple, direct language, of many of these settled rules. That is not to say that he completely eschews controversy. On the question whether an individual can be a subject of international law, for example, Mr. Starke maintains that as a matter of practice 'the almost exclusive concern' of international lawyers is with the rights and duties of States, yet he concedes that there are cases where international law binds individuals immediately. He points out that the rule which authorizes States to seize and punish pirates throws a liability on the individual pirate while casting no duty on a State, for no State is bound to punish pirates. He also cites Article 64 of the Brussels Slavery Convention, 1890, which expressly confers on fugitive slaves who reach the frontier of one of the signatory States the right to claim a certificate of freedom (p. 51). The oft-quoted argument that the rights of individuals are enforceable before an international tribunal only at the instance of States who properly espouse their cause, Mr. Starke regards as a procedural incapacity only, and draws the telling analogy of persons with procedural incapacities before municipal courts, e.g. infants, who under English law can only bring an action by a next friend or defend it by a guardian *ad litem*, but who are nevertheless regarded as subjects of municipal law (p. 56).

On the topic of recognition, again, Mr. Starke remarks that it is 'one of the most difficult branches of international law'; it can be presented only as 'a body of fluid, inconsistent, and unsystematic State practice'. He rejects Professor (now Judge) Lauterpacht's constitutive theory, resting on the legal nature of the act of recognition, as being against the weight of precedents and practice. Moreover, he asks, if there were such a legal duty to recognize as is postulated by Lauterpacht, how would it be enforced? Mr. Starke prefers to regard recognition as a matter of vital policy that each State is entitled to decide for itself (pp. 106–14). He is less contentious when writing of the legal effects of recognition, and aptly enumerates the principal legal disabilities of an unrecognized State or Government (pp. 125–6). The now generally accepted principle that the courts should consult the Executive when questions involving recognition come before them, Mr. Starke attributes not only to the need for unison between the judicial and political organs of the State, but also to what he calls 'considerations of evidentiary convenience': adding that 'it is difficult to see how, on a contested issue of this nature, a Court could take evidence or obtain the necessary materials for forming its judgment in any more satisfactory way'. This seems to be a just appraisal of the practice of the courts in seeking from the Executive information on a 'contested issue' of recognition and to this extent should silence those who object that the solicitude of American and English courts for the views of the Executive is 'so exaggerated as almost to amount to an obsession'.

Perhaps Mr. Starke is at his best in the way in which he presents certain topics in readily assimilable form. Thus in the Section on 'Human Rights and Fundamental Freedoms' (which were not mentioned in his first and second editions), he gives a chronological summary of the principal instruments in which attempts have been made to enunciate or guarantee human rights standards (pp. 276–9). Again, with particularly telling effect, he sets out in concise, logical, paragraphs what he has to say with regard to treaties—their forms, their terminology, and the steps in the creation of obligations by treaty; and the revision, the termination, and the interpretation of treaties. Then, in the fifth part of the book, 'Disputes and Hostile Relations (including War and Neutrality)'—which commences with the cogent sentence: 'Disputes arise between States much in the same way as between individuals, except that the consequences may eventually be much more serious'—Mr. Starke gives an admirable review of the structure, jurisdiction and procedure, including a note on advisory opinions, of the International Court (pp. 333–50).

Special attention may be drawn to the valuable last chapter, which is devoted to international institutions (and is considerably longer than the corresponding chapter in previous editions). Mr. Starke expounds clearly their status and functions as subjects of international law, their general nature, and their constitutional structure. He manages, with some success, to classify them and describes attempts to co-ordinate their working. He examines the organic structure and composition of international institutions and reviews their privileges and immunities, their legislative functions, their 'quasi-diplomatic' and treaty relations; and even includes a section on the dissolution of international institutions and the succession to their rights, duties, and functions. Finally, there is a very useful detailed, though necessarily brief, account of the United Nations, its origins, structure, procedure and organs, including the specialized agencies.

The book is produced in pleasing format and at a moderate price. Mr. Starke has given us an up-to-date handbook, comparatively free from theoretical and controversial matter, of lesser bulk than the standard works intended for specialists but ample for the needs of those whose work and studies require a grasp of the general principles and practice of international law. The book can be warmly commended.

A. B. Lyons

Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law. By Julius Stone. London: Stevens & Sons Ltd. 1954. lv+851 pp. £4. 4*s*.

Professor Stone states in his Preface that his new book is 'first and foremost a treatise, that is, a systematic, documented account of the traditional law . . . [of] disputes, peace enforcement, war and neutrality'. But its main purpose is nevertheless 'to integrate with the literary systematics and social statics of international law, a coherent examination of the unstable dynamics of its operation in a world in travail' (p. vii). His claim to have produced a systematic treatise on the topics indicated is surely borne out. Book II thus contains a comprehensive, though perhaps not a novel, treatment of diplomatic settlement, arbitration and judicial settlement, and of the United Nations machinery for the settlement of disputes, as well as some account of the earlier institutions of political settlement. And it is indeed a documented account. The learned author is not, however, of the school which believes that footnotes should contain only references, and both in this Book and throughout the work fully a quarter of the average page is devoted to notes which must be read with the text.

One may note in passing an inevitable number of obscurities or misstatements, omissions and slips in Book II. Thus, to take only the section dealing with the International Court (pp. 107–43), it may be observed that the apparent suggestion (p. 130) that the Headquarters Agreement of 26 June 1947 between the United Nations and the United States contains a clause conferring on the Court ultimate jurisdiction over disputes is hardly correct. Again, though it may be confessed that the omitted words ('in the Charter of the United Nations') seem otiose, it is not correct to say that Article 36 (1) of the Statute reads: 'the jurisdiction of the Court comprises all cases which the parties refer to it, and all matters specially provided for in treaties and Conventions in force' (p. 123). By the same token, one could have wished for some treatment of the jurisdictional clause in fact contained in the Headquarters Agreement, which is to the effect that disputes shall be decided by an arbitral tribunal, but that either party may ask the General Assembly to obtain an advisory opinion on any legal question involved and that the arbitral tribunal shall in its decision have regard to such opinion. Similarly, it would have been desirable to have some comment on the mention of the Charter in Article 36 (1) of the Statute and on the apparent absence of any provision in the Charter conferring jurisdiction on the Court. It would likewise have been interesting to have the views of an Australian lawyer upon the significant omission of any jurisdictional clause from the trusteeship agreement for New Guinea, the absence of which from the list of instruments conferring jurisdiction on the Court (p. 130, n. 145) immediately strikes the eye. And it would be desirable in a second edition to correct the spelling of the name of Sir Hughe Knatchbull-Hugessen (p. 128) and the reference to the 'Charter' of the International Labour Organization (p. 129).

If, however, Book II (apart from the Discourses, to be mentioned later) does little more than go over fairly familiar ground, Book III has greater interest because it represents the first complete treatment of the laws of war and neutrality, new editions excepted, to appear in English since the Second World War. It contains many sections of great value. Among these may be mentioned in especial those on penalties for carriage of contraband—a matter frequently neglected—(pp. 489–91), on prize court procedure and evidence (pp. 532–42), and on modern anomalies in connexion with the termination of war (pp. 639–47), as well as the suggestive remarks on p. 462 concerning the application of the statutory list to vessels. Professor Stone is to be congratulated on the whole Book, which is a most successful restatement of the traditional law and its recent developments.

But these two principal Books are preceded both by a lengthy Introduction and by a first Book entitled 'Perspective', which, along with Books II and III, is interlarded with no less than 34 'Discourses'. It is no doubt a gross misstatement to say that the Introduction does little more than recapitulate the argument of the Preface, and that Book I largely restates that of the Introduction. It is, however, the case that at p. 49, that is, at the end of Book I, one arrives at the statement: '. . . the present volume is designed, both as an exposition and as a critique of the modern law of disputes, war and neutrality. As such, it is hoped, it may serve not only as a mid-century textbook of exposition for students of law and government; but also as a symposium of problems of the law in action for advanced students. . . .' And this is remarkably like the statement, already quoted, with which the Preface opens, though, in going from the one to the other, the reader has been entertained by the way with a whirlwind survey of all or most of the schools. In truth the book is a little difficult to follow except in its aspect of a treatise on the 'traditional law'. One reason for this is its arrangement. Not only is the eye distracted by the mass of footnotes, most of which must be read because of the frequently elliptic character of the text, but the procession of the chapters is constantly interrupted by the Discourses. And, to no apparent purpose, the lengthy Introduction is paged together with the Preface in Roman numerals. Another reason is that Professor Stone employs what is presumably the idiom of sociology—of which his sub-title is perhaps a fair illustration. The uninitiated thus finds himself continually checked as he reads by such expressions as a 'going group' (p. xli), 'a function of bipolar global power conflicts' (p. 222), the 'psychopathic seizure and manipulation of power' (p. 345), and 'free-floating loyalty-potential' (p. xxxviii, n.). Also, the author has what is positively a flair for the awkward word; he will, wherever he can, substitute for their familiar alternatives such terms as 'interbellar' (p. xxxvii), 'equivalate' (p. 24), 'voidity' (p. 135), 'contentual' (p. 130, n.), 'investigative' (p. 172), and 'regardable' (p. 114, n.).

The major distractions, and the main vehicles of the secondary purpose of the volume —the exposition of 'the dynamic contemporary problems'—are of course the Discourses. Those in Book I are on 'Justice in International Law and Organisation' and 'Soviet and Western Approaches to International Law'. In Book II we find, *inter alia*, 'The Problem of *Non Liquet*...', 'Veto and Great Power Non-Cooperation', 'Has the Double Veto been Legally Ousted?', 'Legal Problems of the Korean Affair', and 'The Problem of the Representation of China'. And the account of War and Neutrality is interspersed with disquisitions on '*Nulla Poena Sine Lege* . . .', 'The Proposed International Criminal Court', 'Is a Prize Court bound by International Law as Such?' and 'The Twilight of Occupation Law', as well as—rather surprisingly—'The Passing of the Property under C.I.F. Contracts'. The nature of the problems treated—and perhaps also the tone of the treatment—is sufficiently indicated by these titles. The learned author is laying his finger on a large number of tender spots in a manner which, it is permissible to say, is not altogether unfamiliar. Yet he is not to be characterized as a 'denier' of the Law of Nations—using that term in its popular connotation. He states, and states well, the law of the books. And he states equally well, albeit somewhat emphatically, the circumstances making for the contemporary ineffectiveness of the law of the books.

It is difficult, however, to put down this volume without some feeling of disappointment at its failure to present such a coherent thesis as its title promises. This is admittedly no 'treatise on human conflict' (p. xxxi). Nevertheless, there would seem to be some general themes which the author rather conspicuously fails to treat, possibly because his scholarship is of so very detailed a sort. He appears, in particular, to ignore certain conclusions to which it might be thought his concern with technological and economic factors would have led him. He has a large preoccupation with these factors, as the titles of Discourses not mentioned hitherto must show: 'Atomic Weapons and International Law', 'On the Distinction between Neutral Trader and Neutral State in Economic Warfare', 'Enemy Character and Economic Warfare', 'The Long Distance Blockade as a Response to Technological, Logistic and Economic Change', 'Economic Warfare and Naval War-Law'. But one wonders if he has sufficiently considered how these factors have influenced the design and working of institutions of political settlement.

Upon the League he appears to offer what may be described as a 'technical' and familiar verdict: it 'failed', to the extent it did fail, because its membership was not universal and its Members irresolute, so that its attempt to apply sanctions was doubly ineffective (pp. 182–4). And similarly of the United Nations, he takes the view that it was at the outset endowed in theory with a power in the Security Council to command crippled in practice by the existence of the veto; that it has escaped extinction partly owing to the circumvention of the veto through the rules developed with respect to absence from and abstention in the Security Council, partly because of the existence in the Charter of 'escape clauses' such as Article 51, and partly because of a practical reversion to something like the League system through a circumvention of the Security Council by such techniques as joint action, as in Korea, and the 'Uniting for Peace' resolutions. But he does not observe, though he lays great stress upon the false lessons the draftsmen of the Charter drew from the collapse of the system envisaged by the Covenant, that the framers of both instruments proceeded upon theories of war and economics which time was to explode.

This was undoubtedly the case. Having had revealed to them, as it were, the state to which Germany was reduced in 1918 and recalling how the long agony of the Western Front had shown that the advantage in strictly military contests lay with the defence in the then state of technology, the architects of the Covenant assumed that economic warfare was of devastating effectiveness and that to attack with arms was always more costly than to defend, and they framed their system accordingly. They provided for the automatic application of economic sanctions and they contemplated that these would be followed up by military action only in the event that the covenant-breaking State should seek to break the stranglehold upon it by turning upon its economic oppressors—in which case it would itself be inevitably broken upon their entrenched positions. But of course the doctrine and practice of *Autarkie* and the development of air power disappointed these expectations and destroyed their underlying assumptions with dramatic suddenness. Nevertheless, the framers of the second scheme for the enforcement of peace fell, and inevitably fell, into the identical error of adopting a fixed theory of the nature of military and economic power at a time of rapid change and we shall have as many 'agonising rearrangements' of the new system as there must be 'reappraisals' of its underlying 'technological, logistical and economic' presuppositions.

The realization of this sort of consideration is at least as important as the drawing of the conclusion that the present dissatisfaction with arbitral settlement arises because that process 'symbolised the messianic hope of subjecting the sovereign State, with its claim to be its own sole judge, to the olympian impartiality of third-party judgment as a means of abolishing war' and that there is today 'nostalgia for such past hopes now patently discredited' (p. 198). But the critique is offered with the apology that it involves the sort of thinking which this thought-provoking book must provoke. Professor Stone opens his work with a statement (characteristically documented) that a scholar is free to delimit his discipline as he will. He disclaims, however, any duty to do so *ab initio* in a field as wide as this, preferring to allow his assumptions and interpretations to emerge *ambulando*. He will, therefore, have both indulgence and indeed encouragement from the reader who wanders a little farther.

CLIVE PARRY

La Notion juridique d'Indépendance et la Tradition hellénique. By GEORGES TÉNÉKIDÈS. Athens: Institut Français d'Athènes. 1954. 210 pp.

The author of this work is Professor of International Law at the École Supérieure des Sciences Politiques d'Athènes. The book is intended, he states in his Introduction, not so much for Hellenists as for jurists, and in particular for those who, while still favouring traditional juridical modes of thought, are none the less attracted by the new discipline called the science of international relations. Professor Ténékidès hopes by his analysis of the inter-Hellenic conjunctures of the fifth and fourth centuries B.C. to throw some light on certain eternal aspects of the problem of federation. For, as he says, paradoxical as it may appear, the idea of independence must come into play in the historic progress which leads peoples to their union.

The book first considers the idea of independence as it manifested itself in the Greek City States and the economic and social factors which produced it. The principle of the independence of the cities was founded on a long tradition and acquired the form of a rule of customary inter-Hellenic law. But it did not exclude the possibilities of either the submission of a city to a juridical superior or the adherence of a city to a confederation of States. Indeed, the Greek City States tended strongly towards alliances (*συμμαχίαι*), but the *volonté d'union* was always balanced by a form of resistance to total integration, so that the autonomy of the City States was ever safeguarded. The learned author finds that Hellenic independence was justified by the fact that without it, the federal régime could not have functioned. Every federation, he says, rests upon the community of interests of the member States, and this community of interests is expressed by the maintenance of the equality of those States. This argument is supported by a number of passages from Thucydides and also by extracts from treaties of peace between the various cities, all of which included a condition to the effect that the cities should be autonomous. Independence, again, is essential for the functioning of democratic government and for the exercise of a healthy external policy. There could, moreover, be no ἀρετή—no civic virtue for the Greeks unless their city was independent. When alliance tends towards protectorate, when protectorate degenerates into overlordship (*domination*), Greece, says the learned author, becomes unworthy of her spiritual ascendancy unless she clings to the political ideas which built up the theory of the autonomous City State. But their independence once acquired, the cities were moved to labour in the ways of true federalism, for the common good of the community of which they were members. In the light of this concept of Greek independence, Professor Ténékidès invites States 'de porter un jugement raisonné sur leur propre souveraineté'.

The thesis put forward in this work is closely reasoned and reveals a mine of scholarship, supported by a wealth of authorities in a dozen languages. It is illustrated by plates showing some of the actual treaties to which Professor Ténékidès refers, with coins recording the ancient Greek confederations and alliances; 'la poussée vers bipolarisme', i.e., the grouping of the Greek peoples around Athens and Sparta respectively; oppression, resistance and revolt.

A. B. LYONS

Conflitti Interni ed Internazionali. By EDOARDO VITTA. Vol. I. Turin: G. Giappichelli. 1954. 225 pp.

Professor Vitta, whose earlier work on *The Conflict of Law in Matters of Personal Status in Palestine* (Tel Aviv, 1941) examined the problem of inter-local and inter-personal private international law in its practical application in one specific area, has now set himself the task of examining the same problem on a comparative basis in order to reach theoretical and systematic conclusions. The author has done both more and less than the title of the book suggests. Individual systems of inter-local and inter-personal law are not examined or discussed, and both legislation and judicial practice are left aside. On the other hand, a great many fundamental questions of private international law are considered in detail, in so far as they have a bearing on the question for examination. In the first part of the book the author treats the history of private international law in order to show the transition from the old concepts of personality and territoriality of laws and the statutist theory to the modern concept, as developed in continental Europe, which connects law, and therefore also choice of law rules, with legislation enacted by the State. This is followed by a brief survey of the countries where inter-local or inter-personal conflict of laws is known and by a discussion of the reasons which may lead to this phenomenon. The first part of the book concludes with an examination of the theoretical basis of private international law.

The second part opens with the statement, significant of the trend of thought of the author, that a similarity of solutions in private international law proper on the one hand and inter-local or inter-personal law on the other hand, is not, so far as the author is concerned, a good criterion for assessing the nature of these respective systems. Although inter-local, and even inter-personal, law has a territorial connexion, it is law within a State but not normally enacted by the State. In order to broaden this distinction, the author devotes a number of chapters to an examination of the nature and function of the respective types of private international law. He concludes that private international law may be enacted centrally, in which case its purpose is, however, mainly jurisdictional and little concerned with choice of law; if created by local, autonomous rules, it has all the characteristics of a system of choice of law. The third and last chapter deals with the problem of characterization and includes, incidentally, a survey of the various doctrinal trends in the field of characterization.

It is interesting to note that the problem of inter-local and, to a lesser extent, of inter-personal law has attracted much attention from writers in Italy and Germany, the laws of which countries have had scant occasion to deal with this question, while Anglo-American students of the conflict of laws have shown little interest in the subject, although the practice in these countries is concerned with it almost daily. It would seem that continental writers are forcibly confronted with it in consequence of their basic approach to private international law. When continental private international law refers to the law of a country, it refers implicitly to the law of a foreign State. If the foreign State possesses no general private law of its own but acknowledges the existence of different law districts possessing a common law or statute law peculiar to themselves, the continental lawyer is forced to search for the link between the law of State referred to, which does not exist, and the law of the particular law district within the State, which he cannot reach with the help of his own rules of private international law. Thus to the mind of the continental lawyer a real problem is revealed, and once it has arisen it may even create a real problem for those administering the common law, where none was before, if a case of renvoi is involved. But the reality of the problem does not necessarily prove the validity of the distinction, in substance, between the nature of inter-State and inter-local conflict of law. It discloses only a different approach to the sources of law. Reliance upon the principle of nationality is only another way of expressing it. The common law, or any other legal system in force in a country which has been conquered by a country having a common law system, is valid, not in virtue of any act of legislation, whether by the central authority of the State or by way of delegation to the regional unit, but because it has been observed as law in the particular law district.

Yet it may well turn out, upon examination, that where the question is one involving two law districts within the same State, certain distinctions of substance will emerge. The operation of public policy may be less rigorous, and even penal and revenue laws may find a more favourable reception. However, such a conclusion is premature as long as the practice of countries possessing a composite legal system, and especially the practice in the United States, has not been examined in detail from this point of view. The present volume offers much food for thought, but it does not, in itself, provide the answers.

K. Lipstein

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